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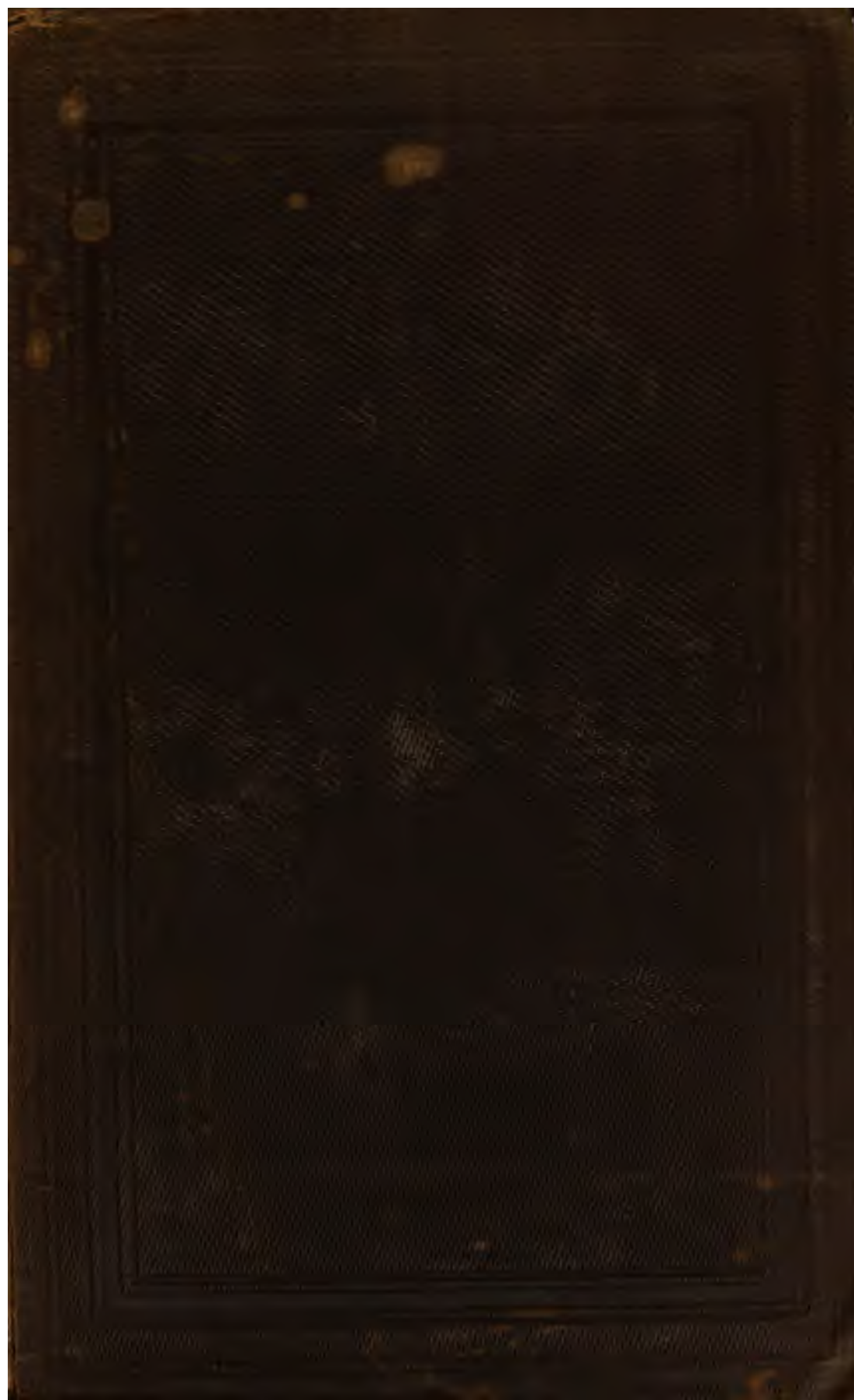
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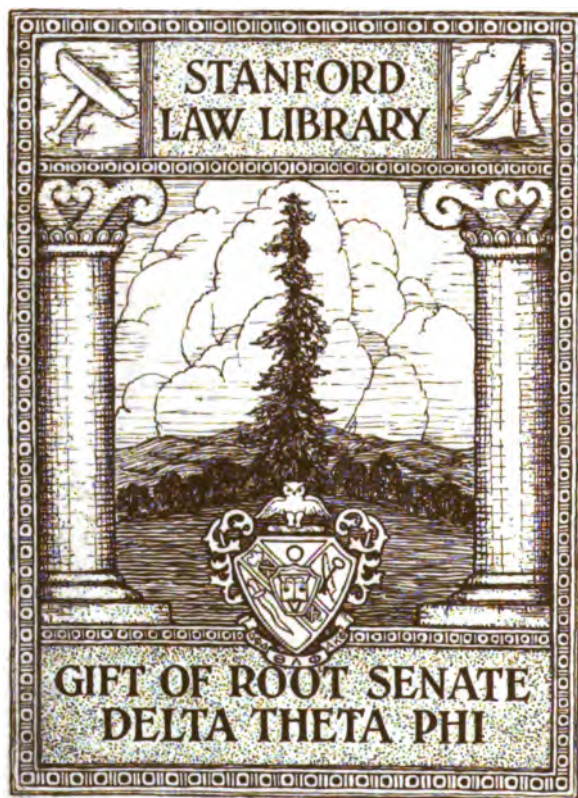
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A HANDBOOK  
OF  
AVERAGE,

FOR THE USE OF  
MERCHANTS, AGENTS, SHIP-OWNERS,  
MASTERS, AND OTHERS:

WITH A CHAPTER ON  
ARBITRATION. 4155

TO WHICH ARE ADDED  
APPENDICES CONTAINING SOME OF THE MOST RECENT  
AND IMPORTANT DECISIONS IN OUR COURTS  
BEARING ON THESE SUBJECTS.

BY  
MANLEY HOPKINS,  
AVERAGE-ADJUTANT.

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SECOND EDITION.

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1859.

"THERE BE BUT THREE THINGS WHICH ONE NATION SELLETH UNTO ANOTHER: THE COMMODITY, AS NATURE YIELDETH IT; THE MANUFACTURE; AND THE VECTURE, OR CARRIAGE: SO THAT IF THESE THREE WHEELS GO, WEALTH WILL FLOW AS IN A SPRING-TIDE."—LORD BACON.

"THE SURE AND ONLY WAY TO GET TRUE KNOWLEDGE, IS TO FORM IN OUR MINDS CLEAR, SETTLED NOTIONS OF THINGS, WITH NAMES ANNEXED TO THOSE DETERMINED IDEAS. THESE WE ARE TO CONSIDER, AND WITH THEIR SEVERAL RELATIONS AND HABITUDES, AND NOT AMUSE OURSELVES WITH FLOATING NAMES, AND WORDS OF INDETERMINED SIGNIFICATION."—LOCKE.

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## PREFACE TO THE SECOND EDITION.

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IN preparing a Second Edition of this manual for the press, the opportunity is afforded me of revising it carefully throughout, and of adding to it such fresh matter as is rendered necessary by the changes which time produces. These additions are interwoven with the text, or are given in foot-notes; but in either case they are nearly always indicated as being new. By the last Navigation Acts an important alteration has been made in the rights of seamen and masters of vessels in regard to their wages; and several noteworthy decisions have been given in our courts of law affecting the subject of Average more or less directly. These new data are now mentioned, and four additional appendices are given. One of the latter embraces two decisions of an eminent judge at different times, relating to the same question; and as they appear to involve a strong contradiction, some comment is made upon them in the text. Another Appendix is inserted giving some curious information relative to interest in policies. It is intended to counterbalance an almost over-scrupulousness entertained by some on the subject of value permitted to be insured.

As the last pages were passing through the press, a decision was given in Court, mention of which could not with propriety be omitted; forming as it does a pendant to what had been already said about freight as an incident of a ship, and the rights of Abandonnees of the latter to freight. A very short summary of *Hickie v. Rodocanachi*, consequently, forms the last portion of the added matter. Beyond the amplifications mentioned, and some verbal emendations, the general form of the book has not been altered.

At the present moment the effects of the great commercial disturbance of 1857 have generally disappeared, and the revival of a sound and profitable trade, without inflation or excitement, is a matter of congratulation to the mercantile classes of our country generally. Unfortunately, one important branch of national activity and investment, the shipping interest, rises more slowly from the late prostration. Owners are inclined to attribute this want of recovery very greatly to the non-reciprocation by foreign nations of those cosmopolitan views of unrestricted trade in navigation to which England and America give the lead. From whatever cause it may spring, the result of a long-continued depression in shipping is very injurious to other classes besides the immediate owners. A too strict economy is enforced in the manning, storing, and sailing our vessels, for the safety of themselves and their cargoes. Owners state that, without the utmost reduction of expenses, they cannot enter into the present strong competition with

any chance of avoiding loss. Unhappily, in direct ratio with overstrained economy is the sacrifice of safety. In building new ships, too, science occupies itself in discovering how to construct the largest and fleetest vessels at the least outlay of material and labour. When the competition lies between a high-priced and a low-priced nation, the effects on the productions of the former are very deteriorating.

On referring to pages 305—309 of this volume, the reader will observe the alarming number of losses at sea, and will not have to seek far why this dark list of catastrophes is not curtailed. Yet, surely, it is the common interest of owners, merchants, insurers, and navigators, that increased safety should be sought for by every possible means until it is attained;—

“ ——— Commune periculum,  
Omnibus, una salus.”

I have been gratified in finding, by the rapid exhaustion of my first edition, a confirmation as to the necessity of a modern work on the subject of Average. I trust that my conscientious endeavours to make the present volume worthy of its position, will entitle it to receive equal favour and to run the same useful course.

MANLEY HOPKINS.

4, Royal Exchange Buildings,  
June, 1859.



## PREFACE TO THE FIRST EDITION.

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THE writer of this volume is frequently asked to recommend a good elementary book upon Average: and he is invariably at a loss when he endeavours to do so. Mr. Stevens' excellent Essay has been so many years out of print that it is impossible to procure a copy. The valuable work on Insurance by Park, and the still fuller and more modern compendium of the same text by Arnould, are books too elaborate, too technical, and too expensive for the purpose. Moreover, they embrace too many subjects besides Average in their design, to render them useful to the persons who desire information on that particular head. For those who are seeking light belong usually to a class having neither the time nor the inclination to obtain it by the laborious study of learned writings. They are, for the most part, merchants residing in foreign countries, agents at outports, intelligent shipmasters, and young men entering offices where Insurance forms a branch of the business,—all of whom desire a short and royal road to such a general acquaintance with the subject of Average as may be useful to them in their several capacities. The only books I know of the kind required, are Lee's Laws of Shipping and Insurance, and a volume published a few years ago in Liverpool by Mr. Bailly, on General Average. The

former of these only takes in Average amongst many other matters. The latter is a useful book as regards the section of the subject to which it relates: it does not, however, emanate from a London source; and there are, from some cause or other, greater discordances between the practice of Liverpool and London than the difference of longitude betwixt those two great shipping ports will account for.

*To be useful*, is the design of the present volume, and the desire of its writer. He proposes to himself no higher aim than this. He attempts to be of service in two ways:—First, by giving a clear and practical view of the subject, so that persons consulting the book need not err greatly in their proceedings: and with this intention the matter is divided in a manner easy for reference;—secondly, by discussing some doubtful or anomalous practices, in the hope that by calling attention to such discrepancies, a more exact and consistent rule may some day be attained. He does not anticipate that he shall at all curtail the practice of professional Average Adjusters by such a Handbook, any more than the numerous text-writers on law supersede the employment of barristers and solicitors. Even when the general bearing of laws is known, there remains the practical difficulty of applying them to the particular instances; and this can only be done by those persons who devote themselves to the study and practice of their profession.

Laws form, in general, the substructure of all our commercial systems, although the outline is often modified and lost by an external covering of customs,

ancient and modern. In this they resemble the human skeleton, hidden by its envelope of muscle, but which, nevertheless, gives form and stability to the figure. The writer's endeavour has been to free this work as much as possible from legal technicalities, so that it may prove, what it professes to be, a *handbook* or *vade mecum*. At the same time, such a treatise would be of small value did it not found itself on the laws by which mercantile transactions are guided. To give it real worth, he has carried the law of the subject down, as nearly as possible, to the time of going to press. The latest decisions of our Courts and Judges are mentioned in passing; and a few very important judgments, recently delivered, are given in full in an Appendix.

The Author is fully sensible how difficult it is, with such an object as he has in view, to attain the *juste milieu* between a style too popular to be instructive, and too scholastic to be readable. The highest praise which can be given to a book of this nature is that which an old poet claims for the river Thames, of being—

“ Though deep, yet clear; though gentle, yet not dull;  
Strong, without rage; without o'erflowing, full.”

But he has been led to hope that in endeavouring to give useful information on a subject in which the commercial world is much concerned, he is making a proper application of twenty-three years spent in the study and exercise of his profession.

4, Royal Exchange Buildings, London,  
April, 1857.

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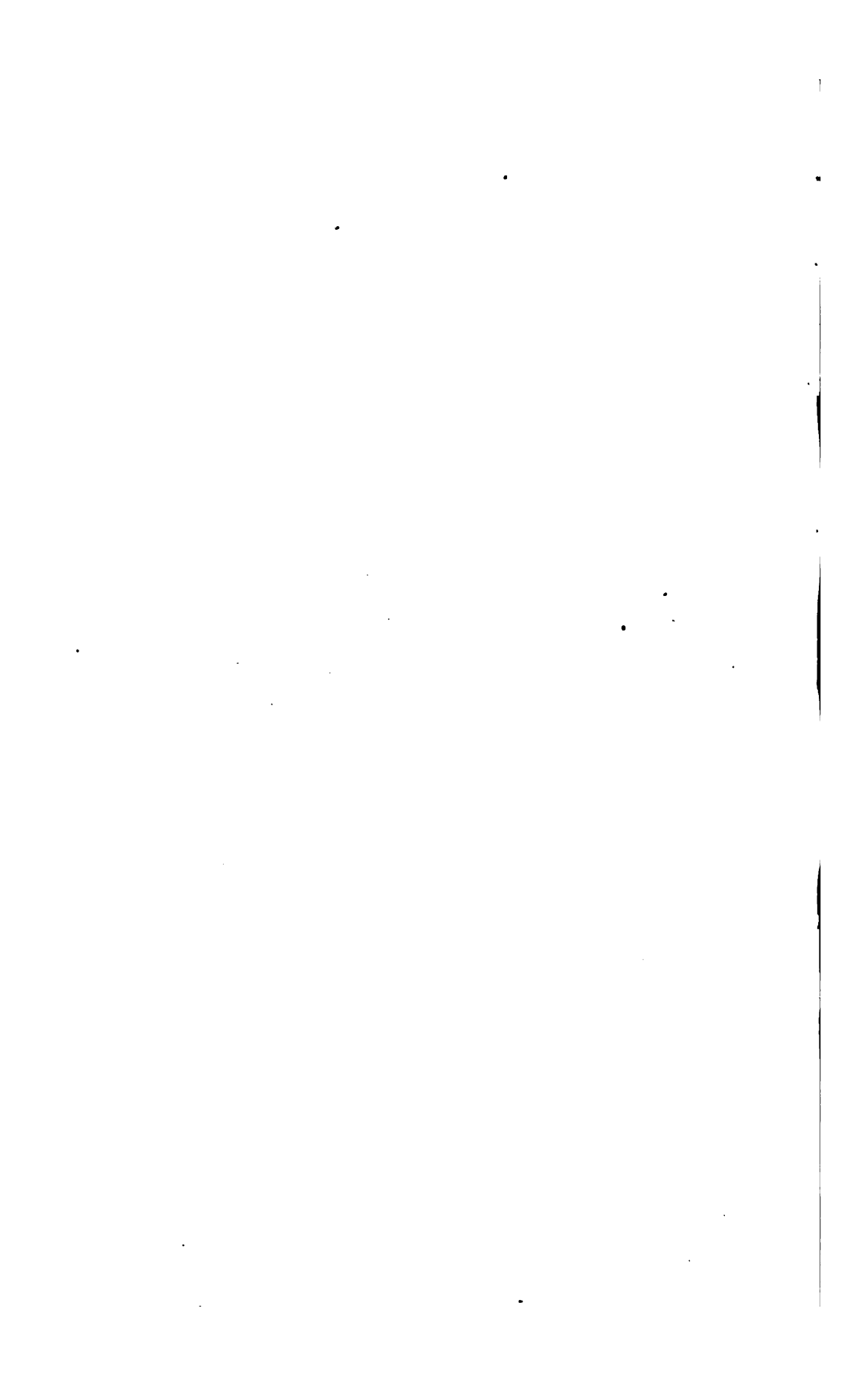
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A

# HANDBOOK OF AVERAGE.

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## PART THE FIRST.

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### WHAT AVERAGE IS:

AVERAGE is a word which at the present day includes a great deal more in its meaning than was originally intended. As to its origin various accounts have been given, or, rather, various guesses have been made. But although the exact parentage of the word has not been satisfactorily made out, *Average* unquestionably conveys the idea of *division of burthen*, or *distribution of expense*; the bearing some *onus* by many—as, for example, a heavy weight carried by a number of men. The signification of the term, therefore, corresponds with what we now call *General Average*.\*

\* Writers on scientific subjects frequently expend themselves at the outset in definitions and derivations. Though this is often carried to excess, it is not unreasonable that some labour should

B

The same word with a somewhat analogous meaning found its way into the Bill of Lading, where it signifies a small contribution from all the proprietors

be devoted in seeking the original terms, as their etymology usually throws useful light on the matter to which they relate. This reason is my apology for the present note.

By the common consent of nations, one word, slightly modified only by the genius of each language, has been adopted to express marine losses. It will be seen how identical this word is :—

English, <i>Average</i> .	German, <i>Averie</i> .
French, <i>Avarie</i> .	Italian, <i>Avaria</i> .
Dutch, <i>Avery</i> .	Spanish, <i>Avaria</i> .
Danish, <i>Haværie</i> .	Portuguese, <i>Avaria</i> .
Norwegian, <i>Haværie</i> .	Russian, <i>Avarcia</i> .
Swedish, <i>Haværie</i> .	

The following appears to be its most probable pedigree :—

From the Greek noun βάρος, a burthen, we have the adjective βαρὺς, heavy, weighty; also the correspondent negative ἀβαρὺς, not burthened; metaphorically, not burthensome. Now, by the well-known substitution of the English *v* for the Greek *β*, we come to the word *avarees*, which nearly approaches the form presented in modern European languages. But it may be objected that we possess few direct Greek etymons, and that we receive Hellenic roots chiefly through the Latin medium, and that, consequently, we must seek in the Roman language a nearer link. We therefore take the verb *averro*, to carry away, and, by an allowable metaphor, to lighten, and trace it in the late-Latin verb *averare*, and thence to the more spurious noun *averagium*, authorised by Sir H. Spelman. We do not stop to connect the Latin verb with the above Greek roots, although it could be done. But it is a question whether the word had not been adopted very early into the Teutonic family of languages; and looking at an old English dictionary, a number of words will be found having the same radical. Thus we have, on the authority of Domesday Book, *avera*, a ploughman's day's work (his proper quota); also we find *aver*, wealth (Fr. *avoir*, qy.), and a beast of burthen. But more important is the thoroughly Saxon-English word *aver-penny*, money contributed towards the king's averages, or carriages, to be freed from that charge. Here *average* and *carriage* are used as synonyms. Then we have *average* itself,

of merchandise on board a vessel, to be given to the master as an encouragement for taking care of their goods. In its primitive sense the term is not properly applied when we speak of a partial loss happening to goods as a *Particular Average*; for that is a loss falling on a special interest: nor for the repairs of a ship required in consequence of damage happening to her by sea perils. The use of the word, however, may now seem justified in these latter instances, because, since the system of marine insurance has prevailed, even these special losses are distributed among many assurers or underwriters; and their being so borne may entitle them to the name of *Averages*.

But it is useless to quarrel with a name which is in very general use all over the world, however much we may object to its application when speaking strictly. We will therefore accept it in the sense in which it is ordinarily used, and proceed to see into what heads the word divides itself. These are,—

First, and most properly, General Average.

Secondly, Those charges and expenses which arise when a laden vessel puts into a port of dis-

an agricultural word, meaning *the breaking up of corn-fields*; also *averia*, *plough-cattle*, and, as a last instance, *aver-corn*, *rent paid in corn to religious houses*.

Through all these words runs the idea either of *contribution* or of *burthen*, except in the word *average* itself, *ut supra*.

I must beg pardon of the reader for detaining him on the threshold by speculations which, after all, are rather amusing than of real importance.

## GENERAL AVERAGE.

*Definition.*

General Average means a contribution according to value made by the associated interests which form a marine adventure. These are the ship itself; the merchandise she carries; and the freight she earns. The persons to whom these several interests belong are sometimes called the Co-adventurers. The object of this contribution is the repayment of some expense incurred, or the restitution of something valuable sacrificed, for the benefit of the whole. This definition of a very reasonable principle being kept in view will be a key to the whole subject. We can bring to its test any charges undertaken or any loss sustained in connection with a laden ship. We ask, Was this expense entered upon for the benefit of all parties concerned? Was this part of the ship or this portion of the cargo knowingly and voluntarily destroyed or abandoned to procure the safety of all the remaining united interests? If we can answer in the affirmative we may be pretty certain that those costs or that loss are in the nature of General Average. To see whether an expense or a sacrifice do entirely fulfil this condition requires in many cases, it is true, more than a first-sight glance. Like other definitions this begins by being simple, but in multiplying its applications to cases other points become involved, which must be considered and harmonised with it. Thus

to take one example, the ammunition expended in defending a ship against an enemy, and the expense of curing the hurts of the seamen wounded in the defence, are held not to partake of the nature of General Average. The grounds on which this exception is founded are very nice, and probably are not strong; but I give the instance to show that other considerations sometimes intervene between the general rule and its particular application. And, again, the simplicity of any rule becomes interfered with after long use by the introduction of new questions concerning it, some of which are confessedly important, whilst others are rather to be called ingenious difficulties thrown in the way. Thus, respecting General Average, the question is raised, how far the successful result of any act is necessary to its being classed as a subject of general contribution. Again, whether the sacrifice of the whole of one of the co-interests can be considered to be for the advantage of all,—for that includes the interest sacrificed. And, how far the *consequences* of a General Average act are to be allowed to extend, and yet come within the definition. And, to what extent it is necessary that the thing sacrificed should have been first specially chosen and limited. Such questions certainly create some uncertainty as to the original proposition; and there seems a tendency in people to a wanton introduction of complex reasoning about plain matters. Yet usually a person's own mind fixed on the simple principle above stated will tell him more, and lead him to sounder conclusions,



than seven wise men who can render a reason but who do so subtilly and hypercritically. In all commercial transactions simplicity ought to be maintained as one of the first elements of safety.

### OF JETTISON.

#### *Jettison defined.*

Jettison, occasionally written Jetsam, signifying *a throwing overboard*, was probably the first occasion of General Average contribution. In the case of jettison the cause and the consequence are so closely connected,—the means taken to procure safety when danger was imminent, and the propriety of making all the persons who received pecuniary benefit by those means share in indemnifying the sufferer, are so plain and clear that they speak to our commonest feelings of justice. Jettison is the casting out of the ship when in great danger a portion of her cargo or a part of her own stores, materials, &c. It is requisite that the act should be performed advisedly and deliberately; and before proceeding to effect it, the master usually consults the ship's company and obtains their sanction for the sacrifice.\* The occasion and circumstances of the jettison ought to be carefully inscribed in the log-book, together with the exact quantities of the articles so lost as far as they can be ascertained.

\* By the law of England, the master is not bound to consult with his officers or crew previously to the sacrifice, although this course when practicable is often prudent.—*Maule and Pollock*, p. 192.

Such are the formalities. The goods thrown overboard must be those stowed below deck. On the subject of deck-loads thrown overboard I shall have occasion to speak hereafter. Of the ship's stores cast into the sea, only those are allowed to enter into the General Average which were in secure and proper situations previously.

The objects thrown overboard must have been expressly selected for the purpose. To throw away that which must of necessity be lost independently does not come under the term Jettison. Neither, to cast overboard a wreck of spars and ropes which had been carried away in a gale and which were encumbering the deck. This latter act is one, indeed, of prudence, but not one entitling general contribution. The first or actual cause of the loss was not voluntary, but was in a peril of the sea; and the subsequent cutting away the wreck merely completed what had before been begun by the winds and waves. By some foreign regulations the value of the wreck itself, as wreck, is allowed in General Average, and this appears reasonable enough; but, hitherto, no such allowance has been made in this country. Nor will it be allowed to charge as General Average the throwing overboard certain parts of the furniture and stores of the ship which are by custom carried in notoriously unsafe situations; such as water-casks, a stern boat hung on davits, hawsers and warps coiled on deck (except when in the vicinity of land), and a few other things.

*As to Freight.*

The owner's freight being, so to speak, contained in the goods, shares the fate of the merchandise, and is jettisoned with the goods thrown overboard. The lost freight is, therefore, also recoverable by General Average contribution.

*Value of the things jettisoned.*

The first point which requires to be settled is as to the value of the articles jettisoned, to be taken in adjusting. Here the rule is plain and very reasonable. The person whose property has been sacrificed for the common benefit is to be placed in the same position relatively to the other persons associated with him as if his goods had arrived with theirs at their destination. An actual loss has been sustained, and it is to fall on all the co-adventurers. The particular sufferer is to be left neither better nor worse off than the others. Not worse—for the co-adventurers are to make good his loss: not better—for he contributes to his own deficiency. Did he not do this he would be better off than the rest, for he would receive his interest in full whilst the others would be rated in order to reinstate him. But as he is not suffered to lose by the transaction, so neither is he allowed to make a gain of it. The market value of goods similar to those of which he has been deprived, at the time of the ship's arrival, is to be ascertained. If some of the sufferer's goods out of the particular parcel from which the jettison was effected arrive, the comparison will be easily made by their means. Unless there be some

very clear proof that his goods were damaged at the time they were thrown overboard, it is to be assumed that they were sound; and the fact that other of his goods arrived in a damaged condition will not militate against him unless it can be shown that their damage took place previous to the jettison. From the market value of the goods, estimated by taking the invoice weights properly reduced, or else by a comparison with that portion of them which actually arrived, are to be deducted the freight, duty, brokerage, landing charges, &c., which would have been paid had the merchandise come to market in its usual course; the object being to place the jettisoned goods on exactly the same footing with those of the same kind and quality which reached their destination. The only charge that should not be deducted is the merchant's commission, for that was his expected profit attaching to the lost goods, and he has been deprived of it by their sacrifice, equally with the owners of the goods or the freight who lost their property for the general good.

The gross amount of the freight sacrificed by the jettison is also to be ascertained, and to be included in the average on the shipowner's behalf.

Occasionally, the invoice cost or shipping value of the goods jettisoned is resorted to. This usually happens when a jettison has occurred soon after the sailing of the ship, which puts back to her port of departure, and it is desired that the average should be settled without waiting for the completion of the voyage. In this case care must be taken to place all values on an

equal footing:—*i. e.* to ascertain them all at the same time and place. This arrangement, however, is rather convenient than correct.

The values of stores and appurtenances of the ship when thrown overboard are more easily discovered. When they are replaced with new articles of the same sort, common consent has decided that two-thirds only of their full value shall be charged in the average statement, the other third representing the previous wear they had undergone. A sixth only is deducted from Chain Cables, and Anchors are allowed in full. If the vessel be on her first voyage no deduction is made from the value of the stores and materials.

#### *Contributing Values.*

We now come to the second question, viz., upon what values are the interests benefited by the jettison to contribute. The answer is unobjectionable. The benefit resulting to each of the co-adventurers is to be the measure by which the contribution of each is fixed. The net or actual value is to be taken of ship, cargo and freight at the port where the voyage terminates and the various interests become dissociated. The articles jettisoned contribute in the same way as those which arrive. Were it not so, the person whose goods were thrown overboard would be in a better position, eventually, than the others; for he would have the value of his missing property made up to him in full by contributions from the rest, whilst *his goods alone* would be free from the expense of that contribution. Although, therefore, it may

at first sight appear paradoxical, it is quite right that the suffering co-adventurer should contribute towards his own loss.

*Weight once proposed as a Basis.*

It was at one time thought that as the actual and immediate effect of a jettison was to relieve the ship and cargo of part of the inconvenient weight she laboured under, weight and not value should form the scale for recompence and for contribution. Further consideration, however, showed that this view was erroneous, and that a monetary basis was the best and most equitable one which could be adopted.

*Analogous Cases.*

Besides the plain and unmistakeable act of jettison concerning which I have been speaking, there are other measures taken in order to escape from danger which are of the same character as jettison ; — analogues of it, without being absolutely identical.

Of such is the case of goods discharged into boats for the purpose of relieving the ship when in danger, and one or more of those boats sinking. So, again, of goods discharged from the vessel with the same motive, and placed on a rock or other insecure place, from which they are afterwards washed away.

So with timber put overboard to lighten the ship—made into rafts, but subsequently lost by the rafts breaking adrift.

*Means used, and Consequences.*

The means and consequences of effecting a jettison may be classed with it, though not coming under the



same name. In an adjustment of average these should follow in the immediate train of the jettison. Such are the breaking down of bulkheads, and doing other damages to the ship in order to get at the cargo which is to be thrown overboard : also, the injury inflicted on the sides of the vessel and its metal sheathing by the act of jettison, or afterwards by the objects floating in the water.

The instances mentioned above, viz., of goods lost in boats in which they had been discharged, or from rocks and other places on which they had been temporarily placed, might be called *mediate jettison*. The means taken had the same object in view as an absolute casting of the goods into the sea,—to relieve the ship, and so to save the remaining interests. And because an attempt was made to prevent their instantaneous loss, which must have taken place had the goods been simply thrown overboard, this economical act is not to operate against the owner of the goods thus eventually lost. In these, as in all other cases of voluntary loss, the spirit of the act is to be inquired into. And, as common sense is said to be the true interpreter of common law, so a truly equitable consideration of circumstances will prove a safe guide for determining all such questions.

#### *Damage to Goods in the Hold during Jettison.*

It sometimes happens that in opening the hatches to effect a jettison, an occasion which is necessarily most frequent during bad weather, water enters the

hold by the hatchway, and injures the goods stowed in the neighbourhood. On proposing this case there scarcely seems room for a doubt that such damage should be claimed in General Average, similarly to jettison, not only as being quite analogous to that, but actually involved in the act of jettison itself. Yet the question as to how such damage should be disposed of is by no means a settled one. I suppose few people would be found to dispute the *principle* which makes such losses General Average, except upon some fine-drawn argument about the extent and intention, the mediate and immediate consequences of voluntary acts. Such reasonings appear too metaphysical to apply to mercantile questions, which should be answered in a simpler manner. I shall have occasion to point out the adoption of similar styles of reasoning about other matters connected with the subject of these pages; and I would only ask the advocates of such fine distinctions whether, with our finite powers, we can ever foresee *all* the consequences of any act of ours; and whether we can curb or prevent effects depending on such acts from extending far beyond the limits we at first intended. Take the analogous case of water poured on a burning house to extinguish the flames, and which water destroys the books in the library; will any one urge in favour of an insurance office not paying, that damage by water was *only incidental* and unintentional, and, therefore, removed from the rule which makes the insurance company liable for fire? I am sure that no such argument would be maintained for a moment.

There is, however, more show of reason in an objection being made to this kind of damage constituting General Average, on the ground of *expediency*. This is the true root of the objection, which, when honestly avowed, is entitled to its full weight. In principle it does not seem to be of much importance whether cargo be thrown into the water or water be thrown into the cargo, provided the act were required for the salvation of the joint interests, and was undertaken for that end. But if it be urged that the admission of claims of this kind is opening a dangerous door to fraud and leading the way to extreme uncertainty; if it can be shown that it is next to impossible to indicate what damage did really accrue in consequence of a voluntary act and how much of it arose from leakage and other involuntary causes; if it be told us as a matter of fact that when such a principle was acted on very numerous claims were made, especially in certain trades, which are known to have been fraudulent,—we should be right in saying that though we adhere to our rule as a matter of principle, yet it may be better to depart from it in some cases on the ground of convenience and for the avoidance of fraud and uncertainty, and to draw some arbitrary lines,—only admitting frankly that they are arbitrary, and are drawn on account of the reasons stated. But I would never resort to this arbitrary line where a case is clear, definite, and free from suspicion. In the instance under discussion I have always been of opinion that this description of damage is most properly General Average, and should not be rejected from recovery as

such except when uncertainty prevails as to its cause and limits.

*Jettison of Deck Cargoes.*

But the most disputed subject in connection with jettison is the throwing overboard of Deck Cargo. It answers the purpose of the shipowner to carry cargo on deck, to increase the earnings of his vessel; and it is frequently a convenience to the merchant, likewise, to send away as large a quantity as possible of timber or other goods in one bottom. But it will not be denied that encumbering the deck of a ship with cargo not only places the goods so exposed in a situation of additional danger, but entails increased risk on the vessel and the cargo below deck, by the surplus weight, the elevation of the centre of gravity, and the greater difficulty occasioned in manœuvring the ship. The law interposed to render deck-loads illegal on certain voyages except within prescribed seasons.\* Deck cargoes are, however, common at all seasons. Were the two consenting parties alone concerned, viz., the shipowner who takes a deck-load and the merchant who ships it, there would probably be but little dispute, because each would be cognizant of the risk he thereby incurred,—the one of losing his goods, the other of losing his freight, and both of

\* By the "Customs Consolidation Act" of 1853, 16 & 17 Vict., ch. 107, deck cargoes are forbidden to be carried from ports of British North America and Honduras, between the 1st of September and the 1st of May. The clearing officer is to give a certificate that all the cargo is below deck. Penalty on the captain for sailing without such certificate, 100*l.* for each offence.

them imperilling the entire joint adventure. As between these two parties, therefore, a settlement is made either by each bearing his special loss, or each contributing towards the joint loss, *ad valorem*.

But there are two other classes of persons whose interests may be damaged by this proceeding, and they must be considered.

First, there may be shippers of goods below deck quite unconnected with the proprietor of the goods on deck, and perhaps ignorant when they sent their property on board of the intention of carrying any deck cargo. These will urge that in case the deck-load is thrown overboard, although for the general preservation, they must not be called upon to contribute to the loss, inasmuch as they never assented to goods being placed on board in an extra-dangerous situation at *their* risk; but, on the contrary, that they are the injured parties by the general increase of danger caused to the whole of the interests through carrying a deck-load at all. They will, at most, consider themselves unconcerned in the fate of goods above-board, whether they be safe or lost; and will not consent to contribute to reinstate the loss of them, although admitted to have been voluntary and determined on to relieve the ship when she was in danger.

So far their argument and cause appear good. But a contrary doctrine may be maintained, if it can be shown that the custom of carrying deck-loads is so usual and so well known that every shipper in particular trades and places is well aware of this fact, and ships with that knowledge in his mind. There

is an important trade consisting of the importation of cattle and other live stock into this country, a considerable part of which is carried on deck. The deck becomes the proper, because the best place, for sea-borne animals. The case of *Gould v. Oliver* related to the throwing overboard a quantity of pigs from the deck, but it was never brought to a satisfactory conclusion. It is thought, however, to support the doctrine that the jettison of living animals carried on deck according to custom is General Average.

Any other sacrifice of live stock carried on deck than by actual jettison must necessarily be rare, but it would be *a fortiori* General Average. A remarkable case occurred (Dec., 1856) of a steamer, the *Troubadour*, bound from Cork to Milford with a deck cargo of live stock, being driven to burn 150 pigs for fuel in the boiler furnaces, the vessel having exhausted her own fuel during an extraordinary detention at sea, caused by violent adverse weather. It is proper to add, however, that the pigs had previously died from the severity of the weather. In the extremity to which the ship was reduced, every spar and loose piece of timber on board was also burnt.

And there is another very important interest connected with those hitherto considered, which very much influences all questions of Average,—I mean that of the underwriters or insurers. We have not yet had occasion to refer to insurance as an element in General Contribution; and as we shall shortly have to enter fully on the subject of insurance, it will suffice in this place to say that the underwriters' in-

terest, though in general terms concurrent with that of the parties whose property is by them insured, is not in all respects identical. So in this very instance. Even though the original parties to a jettison of deck-load may have to pay their quota, the underwriter, unless his consent to risk of deck cargo has been specially obtained previously, will object to contributing towards the jettison of such goods, whether he have insured the cargo itself, the ship, or the freight. He objects to it as an additional and unwarrantable risk; one not contemplated in the rate of premium he ordinarily charges.

With timber-carrying ships, however, it is so common to take a deck-load that policies on cargo usually include a written clause expressing the underwriters' liability in respect of that portion of the cargo. The clause is rarely introduced in policies on ship or freight; so that up to the present moment it may be said, that underwriters are not responsible for jettison of deck-loads unless the policy contains an express agreement to that effect. That agreement is generally couched in the words "in and over all," or "on goods above and below deck," or "including risk of deck-load."

I have, however, long entertained doubts whether underwriters have any valid grounds for resisting jettison of deck cargo, even without a special clause. The custom is so general in some trades that it cannot be ignored or held to be an innovation. If it were so detrimental to safety as is alleged it would not only be excepted from indemnity itself, but the carrying a

deck-load would discharge the underwriter from his contract generally. In the late case of *Cunard v. Hyde*, (Queen's Bench, June 1858,) the policy included the risk of deck-load. The vessel with a deck cargo sailed on the 14th September, and without the clearing-officer's certificate. The defence of the underwriter was that the policy was void *ab initio*. The Court decided otherwise. The captain's offence against the Act of 16 and 17 Victoria did not make the voyage illegal so as to void the policy: and the distinction was drawn, incidentally, between the position of a shipowner or master guilty of an illegal act, and an innocent proprietor of cargo ignorant of and non-participant in such act. Underwriters have it in their power to escape from such a risk by not underwriting ships or goods in particular trades, or by charging an additional premium adequate to the augmented danger. On the broadest principle of sacrifice for the general good I think they are liable in this respect, and that eventually their liability will be generally acknowledged. I am confirmed in my view by what Mr. Arnould\* has expressed, in his laborious and very valuable work on Marine Insurance, on this subject. He says: "But the most important exception (*i. e.* to contribution) is that of goods *carried on deck*, which, as they tend to embarrass the navigation, are not contributed for, if jettisoned, unless they are so carried according to the common usage and course of trade on the voyage for which they are shipped. On

\* Now Sir Joseph Arnould, a Puisne Judge of the Supreme Court of Bombay.



proof, however, of such usage, they are contributed for, if jettisoned, like other goods; and no notice to the underwriters of the existence of such custom is necessary in order to make them liable; they being bound to know the usage of the particular trade. Thus, carboys of vitriol, timber on the voyage between London and Quebec, and pigs between London and Waterford, have been contributed for, after jettison, though carried on deck, an usage of trade being proved, in each case, so to carry them.\* He supports his statement by reference to the great French writers on Insurance, Emerigon and Valin, and by the English decisions in the causes of *Ross v. Thwaites*, *Da Costa v. Edmonds*, *Gould v. Oliver*, and *Milward v. Hibbert*.

Park, whose authority claims our greatest respect, says clearly, goods lashed on deck, if sanctioned by usage, are entitled to a contribution in General Average. The mere fact of stowing goods on deck will not relieve the underwriters from responsibility, inasmuch as they may be placed there according to the usage of the trade, and so as not to impede the navigation, or in any way to increase the risk. He cites as an authority *Milward v. Hibbert*. In *Gould v. Oliver*, during which trial reference was made to *Da Costa v. Edmonds*, it was held that as the stowage of timber on deck was sanctioned by usage the loss was properly the subject of General Average.

I am bound, however, to say that underwriters do not take these decisions to be conclusive, or admit that the principle is yet settled.

\* Arnould, p. 888.

*Jettison of the entire Cargo.\**

The last point connected with jettison which I shall have to discuss is that alluded to in page 7. It is a rule which some writers have laid down that it must be *part* of the cargo thrown overboard which constitutes General Average, but that if *the whole* were so sacrificed there could be no ground for the cargo's contributing, because *it* was entirely abandoned for the safety of the remaining interest. Now in practice we can hardly conceive a case in which the entire of the ship's cargo should be thrown overboard. I never heard of its being done. So that, practically, the doctrine is useless, and does not apply to real acts. But it is also wrong in theory. Suppose, by way of argument, that the whole of the cargo were jettisoned. Previous to that act being determined on all the associated interests were in danger of being lost together. But a general saving may be effected by some voluntary sacrifice, and the cargo is selected,—not because it is intended to make that the scapegoat to bear the whole of the impending loss, but because the sacrifice of that portion of the co-adventure will be the efficient cause of safety to the rest. The ship is saved. The proprietor of the cargo would therefore demand of the shipowner to make good the value of his goods sacrificed for the selfish object of saving the ship. If the shipowner succeeded in resisting this demand, the whole loss would remain with the proprietor of the cargo. This is one horn of the dilemma. If, however, the cargo prevailed, and the ship had to make good the entire value of the goods,

then the cargo would have been the only *gainer* by this voluntary loss. What then is the reconciling course which equity would point out? Why, that the ship, the cargo, and the freight should each contribute, and so a similar position to that which existed before the jettison should be restored. All interests were at that crisis in equal and in imminent danger; a judicious act was performed, by which a part only of the values was lost, and all the interests were benefited by it;—the ship being actually saved, and the cargo and freight constructively saved, in the sense of their being afterwards made good in value. All, therefore, must contribute to make good that loss; or, in other words, divide the loss between them.

*Remarks on Jettison.*

It is not, however, every act of throwing overboard which should, in strictness, be called a Jettison; for that term implies a subsequent restitution by contribution from other interests. Maude and Pollock\* refer to *Mouse's case*, an ancient decision, "where it was held that passengers may, for the safety of their lives, and *navis levandæ causâ*, throw goods overboard without being responsible to the owners, and in which no question of Average, properly speaking, seems to have been raised." Nevertheless, jettison, as we understand the term, formed a portion of the Rhodian law, which law has become imperishable by being embalmed in the maritime judicature of other nations down to the present day. And Pardessus

\* Compendium of the Law of Merchant Shipping, 1853, p. 189.

cites the letters patent sent by our Edward I. to the Cinque Ports, in the year 1285, specifying the valuables which were liable to contribute in case of jettison; of which the list appears more comprehensive than our own. But of throwing things overboard without respect to after restitution two instances are found in Scripture, which serve well for types of two classes of this emergency: one being the case of Jonah, where a human life was sacrificed; the other occurring in the minute and interesting account of St. Paul's shipwreck at Malta, where, in the great extremity to which they had been previously reduced, the ship's company threw overboard their provisions and the tackling of the ship.

*Paramount Consideration of Human Life.*

Although in discussing and legislating upon jettison and other acts of General Average we take into consideration only the values of the joint interests of ship, cargo, and freight, yet there is no question that self-preservation is the predominant motive for the sacrifices then made. This is so natural that no reference is made to it in dealing with General Average, in adjustments. It is not, however, humanity alone which silently admits the saving of life to be the spring of action and justifies all the steps by which it is accomplished, for expediency, even, coincides in the same decision. It is plain that human agency is absolutely necessary for the preservation of the property with which it is temporarily associated; and that whatever steps, short of abandonment, are adopted to

promote the safety of the master's and mariners' lives, are also incidentally productive of advantage to the ship and her burthen.

*Ancient Discussions on this Subject.*

I may add that the agitation of questions bearing on this subject is by no means confined to modern times. Cicero, in his Offices, quotes a passage from the Sixth Book of Hecaton's work of the same name, in which are discussed the respective rights of humanity and private property in the case of a ship in danger, when it becomes necessary to make a jettison.

Having thus dealt with the subject of jettison, we pass on to the other heads of General Average Contribution.

*Sacrifices and Expenses.*

These consist of two classes, viz. :—Sacrifices and Expenses. We will consider the former in the first place.

OF SACRIFICES MADE FOR THE GENERAL BENEFIT.

*Conditions necessary.*

As in the case of jettison, the sacrifice must be made deliberately, voluntarily, and with the object of saving or protecting the remainder of the property at stake. If some judgment be not used in the transaction, doubt and discredit will be thrown upon it, and a difficulty may arise in getting the parties interested to contribute towards the loss. Thus, a good deal of comment took place when the captain

of an East Indiaman threw overboard a chest of silver plate, the value of which was enormously disproportioned to the relief afforded by its jettison. It naturally created suspicion about the *bona fides* of the whole affair, and even the truth of the statement. Nor may the articles sacrificed be those which would be lost immediately, if not abandoned or destroyed. There may be a few instances in which such a sacrifice produced a desired effect, but in general the inference would be that they were purposely sacrificed to save the owner a private loss of them from which there was no escape.

Then, a good deal has been said upon the necessity of fixing beforehand the exact objects and extent of the sacrifice to be made; and, also, it has been held that general contribution cannot be claimed for *every* consequence of a sacrifice admitted to have been primarily made for the common good. I consider this doctrine somewhat doubtful and over-refined. I shall have occasion to notice the subject hereafter, when speaking of ships purposely run on shore to avoid total loss, and of water poured down the hatches to extinguish a fire on board.

*Of the maxim, "Causa proxima non remota spectatur."*

I shall likewise have more fitting opportunity for examining the truth of a maxim current in maritime law, that *causa proxima non remota spectatur*; that the immediate or nearest cause of any loss is to be looked to in deciding its application, and not a more distant or anterior cause. For the sake of being sen-

tentious, maxims were frequently made inconveniently sweeping and inclusive. In practically applying them, they require, as it were, a bill of exceptions. It is found that the principle has been stated too generally, and that it would have been more useful and less liable to mislead had the expression of it been modified and restricted. Upon the principle expressed in the above maxim, *motive* should have little or nothing to do in deciding on whom the onus of a loss should fall, although it was procured voluntarily to avoid a greater loss. This would militate very much against all that is settled about General Average, and therefore we had better dismiss the axiom from our minds, or be careful to use it in a limited manner. It would be quite as generally true to say that in General Average we must look to the original or final cause of the loss as to the immediate or proximate cause.

#### *Loss of Anchors and Cables.*

The voluntary loss of anchors and chains is one of the most usual of all the forms of sacrifice entailing General Contribution. As such it rises first to our notice.

When a ship at anchor is in danger of driving on a lee shore, during a gale; or when another vessel riding in her neighbourhood is driven towards her, and a collision becomes probable; or when in violent weather it becomes necessary to leave an anchorage, it being no longer safe to remain there, and it is found impossible to weigh the anchors; or when to

extricate a vessel that has got ashore her anchors and cables have been carried out for the purpose of heaving her afloat;—when in any of these cases the general safety is secured by slipping from or cutting away the ground-tackle, such loss is to be made good in General Average. The ropes or chains must really have been cut or slipped for that purpose; and there must have been some reasonable expectation that their sacrifice would produce the effect desired and intended. Proper precautions should have been taken, also, for the recovery of the anchors and cables, by having buoys attached to them previously to slipping.

In making good anchors and cables slipped, it is the custom to charge the entire cost of the anchor, two-thirds the price of a rope cable, and five-sixths that of a chain,—except when a ship is on her first voyage, when all are charged in full.

#### *Exceptions.*

There are two or three exceptions to claiming as General Average anchors and chains which have been cut, slipped, or unshackled. One such exception is the case of foul anchorage. When a ship in her ordinary navigation drops her anchor among rocks, or moorings of other vessels, and afterwards finds it impossible to weigh it, and is in consequence obliged to unshackle the chain or cut the rope cable, the loss is borne by the owner; for the anchor and cable were in fact lost as soon as they were dropped,—just as much as if the cable had immediately broken. They were in a situation from which they



could not be recovered, and so there could be no claim as for a voluntary loss. But, if a vessel is driving with her anchor down; or being in danger, she lets go her anchor, and it hooks or drops into moorings, rocks, &c., and she is obliged to slip, then it becomes General Average. Or, in case of a vessel fouling another ship's ground-tackle, and slipping from her cable to extricate herself,—if the anchor could have been recovered in ordinarily fine weather, but a gale coming on makes it highly dangerous for her to remain where she is, and the cable is in consequence cut or unshackled, the loss then ranks as General Average.

If an anchor by which a vessel is moored is lost by the parting of the cable, the loss is denominated “wear and tear,” and is borne alone by the owner. It is an ordinary casualty to which vessels are liable. In fine weather and usual circumstances the chain, in this case, then hanging loose, would be hove on board again. But if after the parting the ship drives and is in danger, and the crew is too much occupied in other necessary manœuvres to heave in the chain, or if the chain by its weight lists the vessel dangerously on one side, the loss of the remainder of the chain by slipping it is, very properly, the subject of General Average. It is, indeed, difficult, or, rather, impossible, to decide the length of the piece of chain so slipped, but this is one of those matters which must be left to the judgment of the person charged with arranging the General Average Contribution, to settle.

The accessories of anchors and cables, such as

buoys, buoy-ropes, and chains, follow as a consequence the loss of the tackle to which they belonged. So also does a hawser used as a spring on a cable in order to cast a ship's head round in a particular direction, and which is cut and lost when the cable itself is slipped.

The precaution should always be taken to have the anchors branded with the ship's name, to facilitate their identification in case they should be recovered. When anchors and cables are regained after others have been bought to replace them, they are generally sold for the benefit of those concerned with their loss, and the net proceeds of their sale, after deducting the salvage and other expenses, go in reduction of the cost of new anchors and cables.

But if they are picked up previous to new ones being purchased, then the salvage and all expenses of the recovery are chargeable in General Average.

Anchors and cables are not the only tackle liable to be sacrificed in the moment of danger. Hawsers, warps, and other ropes are often lost, destroyed or injured in bringing a ship and cargo out of peril. In order to establish the principle of their being paid for in General Average, it must be shown that they were being employed at the time of their loss in a service which was beyond their ordinary use and intention. For warps and other ropes are put on board purposely to be used on certain occasions; and by their ordinary employment they frequently are broken and lost, and necessarily, in time, become worn out and unserviceable.

The difficulty is to distinguish where the ordinary use of a thing ceases, and when a service that may be called extraordinary commences. Experience and technical knowledge must be resorted to in all such cases of doubt. There is no question, however, that to take the ship's ropes when she is on shore in order to heave her off, moor her to rocks, &c., tow or warp the vessel into safety by steam or extra labour; or to divert them from their proper use in order to secure a rudder, to fish sprung masts, to set up jury rigging, or to prevent cargo that has broken loose in the hold from shifting about and injuring the ship's sides and imperilling the general safety,—is to apply them in a way not necessarily contemplated when they were put on board, and any loss or damage accruing to them by such use should be made good by the interests generally, since they were all benefited by it.

#### OF CUTTING AWAY RIGGING, SAILS, AND MASTS.

It not unfrequently happens that by a sudden squall, or some similar cause, a ship under canvas is thrown on her beam-ends, with her yard-arms and part of her sails in the water, and owing to the last circumstance, or from the shifting over of the cargo, she is prevented from rising upright again. To relieve her from this critical position, it becomes necessary to cut away the weather rigging, the sails, or the masts themselves. This is a loss which must be made good by General Contribution. The more imminent the danger from which the vessel was

rescued by the cutting away, the greater the justification for such a sacrifice. In making good the damages and losses the question occurs, What will be the just sum to charge the parties benefited? For the materials cut away may have been old and worn, whilst those by which they are replaced are generally new; and if so, the shipowner actually benefits by the accident in the improvement of his ship. This improvement by receiving new for old is sometimes called **MELIORATION**. I shall have to speak of this subject when treating of Particular Average on ships; and it will be sufficient to say here, that to avoid giving the owner the advantage of melioration, repairs coming under General Average Contribution have been placed on the same footing as Particular Average, viz., one-third part of their amount both in regard to materials and labour being deducted. It is true that the assumption on which we proceed in making this invariable deduction is an arbitrary one. In many cases no advantage whatever is gained by the owner in consequence of the repairs effected, whilst there are other instances where the melioration is probably nearer two-thirds than one-third. It would be so inconvenient and so difficult to endeavour to fix in each individual case the extent of the benefit, or melioration, by repairs, which as before mentioned may vary from absolutely nothing to a very large proportion, according to the age and wear of the ship and her stores, that, practically, the deduction of a third is found an equitable rule, and is sanctioned

by general custom. If, however, the sails, &c., cut away were quite new at the time of their loss this rule is departed from, and the whole cost of them, without deduction, is allowed.

*Sails, &c., sacrificed in another way.*

A sail or other parts of the ship may be sacrificed without being cut away. A ship driving towards the shore in a gale or squall may have had her sails blown away by the violence of the weather, and it may be quite plain that any sail hoisted must almost inevitably share the same fate; yet it may be the ship's only chance of escaping from that lee shore, to set a sail or a tarpauling in the rigging as a last resource, to try and wear her head round; and the purpose is sometimes answered if the sail, &c., so exposed only last a few minutes or seconds. This is an unusual service of the ship's furniture, and must rank as a voluntary sacrifice.

So, too, the use of sails hoisted to force a vessel off the ground when she is stranded, and thus destroyed or injured. This, also, is an extraordinary use of the sails; a course quite opposite to their intended application, and they should be made good in General Average.

For the same reasons chains, hawsers and anchors are to be allowed when let go, because a ship under sail finds herself driving on to a reef or shore, and the attempt is made to bring her up all standing. The lowering the anchors at such a time is attended with the full knowledge of the extreme risk of their

being lost and with the prospect of their very probable sacrifice.

*Any Stores diverted from their proper Use.*

And, in general, the diversion of stores or any materials of a ship from their original and intended purpose to some other use necessary but not contemplated, brings them within the class of General Average. So, sails used to cover the deck or hatches after an accident to prevent water going below, or hauled under the ship's bottom to stop leaks there; so, a hawser or ropes employed to support a mast or to secure a rudder; so, even, coils of new rope, being the ship's stores, used on any extraordinary emergency for the general safety of ship, cargo, and freight; so, ropes and other articles used for chocking and securing a cargo of iron or other heavy goods which has broken adrift in the hold and endangers the general safety, are all classified under this head. But if, when owing to straining the decks have become leaky, and to protect the cargo below from the drip, sails are taken into the hold to cover the perishable merchandise and are thus injured or destroyed, the case is different; the sole object of the sails being so used is to cover the cargo and prevent injury to it, and the loss or damage received by them is applicable to the cargo solely.

The loss of boats may likewise form a claim for General Average. It is true that their proper and ordinary duties expose them to risk of loss and damage, and their loss, or the repairs to them, can

only be allowed when the boats are clearly being employed in work which is extraneous to their intended use—such as carrying out anchors and chains, and heaving a ship off when she has been stranded.

. *Consequential Damage by Masts, Spars, &c.*

When masts and spars which have been cut away, in falling injure the deck, destroy rails and bulwarks, and do other damage, the repairs of such damage belong to General Average. And if after the mastage has fallen into the water it strikes against the ship's sides and knocks off or injures the metal sheathing, it may well be supposed that this damage is likewise claimable as General Average. But here the present custom is inconsistent with itself; for it is held that the injury thus sustained by the sides and sheathing does not form an item for general contribution, but falls on the ship alone. There can be little doubt that, as a matter of principle, this practice is erroneous; for it seems illogical, in a progressive series of consequences clearly dependent on and traceable to one cause, to classify a certain number of the links of the chain in one category, and to make a new rule for the succeeding link. I have listened to the arguments in favour of this distinction, and they have always appeared to me unconvincing enough. In fact, it is one of those subjects where argument is misplaced; for it is *expediency* and not *principle* which draws the arbitrary line of demarcation. It may be advisable to stop short in the middle of a train of consequences, when difficulties might

arise in following them out to their extreme limits—but if so, it ought to be done simply *as* a matter of convenience or custom, and should not be attempted to be defended on other grounds.

*Ship run on Shore when in danger of Sinking  
at Sea.*

It not unfrequently happens that owing to damages received at sea, a vessel is in such a leaky state as to be in danger of foundering; in fact, must sink, in spite of every exertion at the pumps, &c., except she be prevented by one alternative,—that of running her on shore. When the opportunity presents itself for effecting this, that course is adopted. All the possible contingencies of injury to the ship in doing so are voluntarily incurred, it being the only means left of saving anything. The soundness of the vessel is in this case the thing sacrificed. What exact matters that sacrifice may consist in, and to what degree the damage may extend, must remain to be determined afterwards, when by an opportunity of survey her condition can be ascertained. There is no difference between this voluntary act and others previously described, except that in the case now before us the precise amount of damages voluntarily entered upon cannot be determined beforehand. But neither can it be so determined in many minor acts of sacrifice; since the consequences of these acts, as I have shown, frequently vary, and extend beyond the degree intended or anticipated.

It will, therefore, be a matter of surprise to most



persons to whom the subject is new, to hear that damages to the ship incurred in this manner are not considered to be General Average. The reasoning which supports this decision is very curious, and serves to show how an argument that will not hold water is relied upon and left unquestioned through a long series of years.

The two reasons put forward to satisfy us that this damage is not of the nature of General Average are, first, that which I have just mentioned, the indefiniteness of the injuries to the ship purposely entered upon by running her ashore. By this it is asserted that one feature necessary to General Average is lacking. I think I have already shown the fallacy of such an argument sufficiently, in stating that in nearly all cases of sacrifice there is the possibility of the amount of it extending beyond the limits expected and calculated on. There appears no more difference than there is between the two cases of a person assisting a needy friend by a certain sum out of his purse, or by his placing the whole purse at his disposal to take what is necessary.

The second reason assigned is this:—that in the case of a ship about to founder being run on shore, her impending fate was *not probable*, but *absolutely certain*. Had she been left at sea she must have sunk; and the driving her on rocks or sands was a desperate measure, a mere *sauve qui peut*, and that consequently any damage so incurred must be borne individually by the sufferer, and not be made good by general contribution.

Instead of ridiculing this argument, as one at first feels inclined to do, I seriously answer, that in all cases of General Average it is the rescuing the joint interests from threatened loss or injury which is the ground of the claim :—that the more imminent the danger avoided, the more clear is the advantage gained through the means employed. If the dreaded destruction of ship and cargo seemed at the moment it was escaped an absolute certainty, the more cheerfully, it is to be supposed, would all the persons whose property has been saved join in reinstating the loss of the suffering proprietor. If I give my hearty thanks to the man who saves me from drowning by snatching me out of the shallow water into which I had just fallen, are not my gratitude and rewards due in a yet higher degree to him who brings me on shore out of deep water, when my life was on the very verge of extinction ?

And, if the saving of a ship and her cargo by some voluntary act from a possible or probable loss be the ground of General Average Contribution, *à fortiori* it must be the ground of the same when the probabilities of loss have so increased as to amount to an almost certainty.

*Legal Views of this Subject.*

It is satisfactory to observe that the latest legal writers unhesitatingly assert such loss to be General Average. Sir J. Arnould emphatically lays down that “where the ship is voluntarily run ashore to avoid capture, foundering, or shipwreck, and is afterwards

recovered so as to be able to perform her voyage, the loss resulting from the stranding is to be made good by General Average Contribution. There is no rule more clearly established than this by the uniform course of maritime law and usage." And after quoting the corresponding dictum of Emerigon, he goes on to say, "The rule has been laid down in the same way by Lord Tenterden in this country, and by Chancellor Kent in the United States, where it has received the sanction of several decided cases."\*

And Messrs. Maude and Pollock, after following Sir J. Arnould in his view, remark, "It will be observed from the cases cited above that the claim to contribution may extend to collateral damage necessarily connected with the main injury which forms the subject of General Average."†

But in spite of these opinions, which in themselves and from their accessories are of much weight, a different rule prevails in practice, and each of the co-adventurers is made to bear his own loss in cases of voluntary stranding.

*Damage by throwing Water down the Hatches.*

The last case I shall have to mention in which voluntary sacrifice is involved relates to damage done

\* Arnould, *Marine Insurance*, p. 898.

† Maude and Pollock, *Compendium of the Law of Merchant Shipping*, p. 192.

A very pronounced instance of the American view taken on this subject happens to be in course of settlement at the time I write (March, 1859.) All the damages to ship *and cargo* purposely run on shore are charged in the American Adjustment as General Average. The contribution thereto almost equals a total loss.

to goods in a ship's hold by throwing water down the hatches to extinguish a fire.

Here, again, an act is performed manifestly for the common good. Either the fire must be extinguished, or a total destruction of ship, cargo, and freight will ensue. The means taken to rescue the conjoined interests from that destruction damage a portion of the cargo—one of the interests. This damage then, it follows, should be made good in General Average. No; it is not so. This is another case wherein our reasoning is set at fault by the present practice, which decides that the damage occasioned to the cargo in this manner must be borne by the goods themselves. The practice is supported by the same kind of argument as that relating to a ship purposely run on shore, and the same answer and illustration will apply to it with equal force. All that can be said, then, in reference to both these instances is, that if the existing practice be more convenient and less open to fraud and mistake than any other method by which such damage and loss can be dealt with, it may be advisable to pursue it; only with the proviso that it is not justified by a defence which we have shown to be fallacious, but that it is adopted on grounds of expediency solely.

#### *Ransom and Composition.*

If a merchant vessel be captured by a public enemy it is not allowed, for national considerations, to ransom her: consequently a sum of money paid for the ransom of the whole co-adventure could

not be recovered from the several parties as General Average in a court of law or equity. But the same consideration does not apply to a pirate or private marauder; and, therefore, money given to the captor by way of composition to effect the release of the vessel and her cargo is properly claimable by General Contribution. This item of average seems to apply, in strictness, rather to sacrifice than to expenses, and I accordingly mention it in this place.

#### OF EXPENSES INCURRED FOR THE GENERAL BENEFIT.

The same test will apply to expenses as that by which we decided on sacrifices; but the application is not in all cases so clear, or the result so unquestionable as could be wished. We shall have to point out some anomalies sanctioned by long usage. Venerable errors have often more authority than upstart truths: and it is always a difficult process to eradicate a fallacious custom or opinion, if it be endeared by long familiarity.

#### *Assistance to a Ship in Distress.*

- Assistance afforded to a vessel in distress is an obvious subject for General Contribution, whether it be required for taking her into a port of refuge during a storm, or to effect repairs when disabled, or for getting her off the ground when stranded; for pumping; for helping an exhausted crew in the ordinary manœuvring of the ship; for carrying

off anchors and chains, and other necessary supplies from the shore to the vessel; or for giving additional strength to a crew, so that they may continue the intended voyage, when the alternative would be to incur greater expenses by refitting, &c., in an intermediate port.

*Passengers' Services.*

If a ship having passengers on board spring a leak, or from some other cause require assistance by additional hands, and the passengers be employed to pump and aid in navigating the vessel, the sums paid to them for their labour are to be treated as if the aid given were that of strangers.

*Crew's Exertions.*

But the ordinary crew of a ship are not to be paid an additional sum for their extraordinary exertions, because it is their bounden duty to give their utmost efforts for the preservation of the ship and the prosecution of the voyage:—and to reward men for doing their plain duty is an immoral act having a very bad tendency. If once seamen found that in the hour of peril they were able to strike a bargain with the master for their services, the very worst consequences would ensue. There are a few exceptional cases where the judgment of the Adjuster must decide whether the circumstances bear out some additional payment to the crew:—as, for instance, when a ship in a disabled condition puts into a port where leaks cannot be stopped, or where repairs cannot be effected without very heavy expenses, and it becomes

highly desirable to reach if possible the place of destination, yet the consul is of opinion that the ship's company cannot *be forced* to go to sea again in the vessel's then condition;—in such a case, if the offer of additional pay and an allowance of additional victuals and spirits prevail with the crew to proceed on the voyage and to redouble their exertions, the successful result of such an arrangement would justify the proceedings, and the parties interested would scarcely object to a payment productive of so much advantage to themselves, and only questionable on more theoretical considerations.

### *Salvage.*

When the situation of a ship is dangerous in a high degree, and the fear of her loss is very great, the services of extraneous persons who rescue her from that peril, who drag her off rocks, disentangle her from surrounding sands, or who save her from sinking, are regarded in a different light from mere *assistance* which is to be paid by the man, by the tide, or by the hour,—and they go under the name of *salvage*. When salvage services to a ship and her cargo are paid for in one sum, in accordance with a previous agreement or a subsequent compromise, by an award of referees, by the arbitration of magistrates or commissioners, or by the decision of the Admiralty Court, that amount is frequently allowed to form an item of the General Contribution, and is divided on the same values as the

other common expenses.\* But if special valuations of ship, goods, and freight were made by or for the arbitrators, Admiralty Court, &c., for the purpose of coming at a decision, it is the better plan to adhere to those valuations in dividing the salvage. And if the arbitrators, &c., specifically name a separate sum of salvage to be paid on each of the interests, those sums should in most cases remain undisturbed and separate in the adjustment.

In consequence of services coming under the name of Salvage being paid, *eo nomine*, at a higher rate than assistance not so denominated, we may expect to find attempts made to elevate labour and aid of ordinary character to that name. So, too, the term "wreck" is seized upon and applied to vessels and other objects, improperly, for the same purpose. In *Palmer v. Rouse* (Exch., June, 1858), some rafts of timber moored in a river broke away and drifted out to sea. But the Court held that the timber was not "wreck," so as to entitle to salvage.

#### *Expenses going into Port.*

If a ship is forced by accidents or some necessity to resort to a harbour or port for refuge, repairs, &c., her expenses in going there and entering the harbour are General Average. These consist generally of pilotage, boat-hire, harbour and light duties, quarantine and health dues, use of warps and tackle, getting her into the harbour and mooring there, wharfage,

\* This practice is not defensible on principle, chiefly on account of the method followed in valuing freight for contribution.



custom-house entries, telegraphic messages, and the like. But if the vessel only go into port in consequence of contrary and foul winds her expenses are not considered General Average charges, but merely expenses incidental to ordinary navigation, and for which the owner alone is responsible.

*Survey.*

If the ship be injured, or supposed to be injured, when she enters a port of refuge, in nearly all cases a survey is held on her arrival there by competent nautical men, who recommend after their inspection the course necessary to be pursued, whether to discharge the cargo, repair damages, or continue the voyage in her then condition. This first survey regards the collective interests, and is, therefore, General Average.

*Discharging Cargo.*

If the vessel have sprung a leak or have injured her keel or bottom and it becomes necessary, in order to get at the damaged part, to discharge the cargo, the labour of discharging is General Average. So are lighter and boat hire with the goods to the shore, cartage of them to the warehouse or other place of safety, the labour taking them into the warehouse, the pay of custom-house officers attending the discharge and warehousing, police or military guards, metage from the ship, use of tackles, planks, baskets for discharging, &c. If the cargo be kept in the lighters instead of being landed, some portion of the lighter-hire is usually applied to General Average; for it is

considered that to hire lighters instead of a warehouse on shore is a more expensive course, and on the other hand the increased expense of transit from the ship to the shore and warehouse has been saved, and an equitable compensation should be made for it by the Average Stater.

*Agent's Commission and Expenses.* -

When a merchant or agent makes the disbursements he charges a commission for advance of funds. This is applied as a percentage to all the columns of disbursements. His travelling and other small expenses usually belong to General Average. The agent very commonly makes a charge for his trouble and attendance, his general supervision of the business, correspondence, &c.; this is most frequently charged to General Average in one sum.

*Documents.*

The expense of noting and drawing the Protest, either by a Notary Public, a Tribunal of Commerce, by the Consul, or by some authorised person; the captain's deposition before the Receiver of Wreck; stamps, certificates, oaths and attestations, duplicate copies of papers and the like, are classed under the same head. So also, generally, is the cost of the average statement and translations, fees for collecting the value of cargo, &c. In some foreign places and in America the person who collects the average frequently makes a charge in form of a commission for so doing, but this is not allowed by our usage.

*Charges when a Ship is a Wreck, &c.*

There are also some charges incurred after a ship is stranded, or is in such a situation as to render it certain that she will never complete the voyage she is on, and so is to all purposes a wreck, which still partake of the nature of General Average. Although, generally speaking, the wrecking or stranding of a vessel breaks up the adventure, and so dissociates the interests, yet the expenses alluded to do not apply separately to the several interests, but are to be divided over them, *ad valorem*. Thus salvage services; attempts, though ineffectual, to get the ship off; watching; the general attendance of Lloyd's Agent and other agents; documentation, and other expenses intended for the whole property without exception, are to be thus divided. It is not that there is any longer a bond of union among the several interests,—for that is now destroyed,—but because this is the best manner of applying the charges to the various interests. And there are charges which do not seem to apply, at first sight, to more than one of the interests, perhaps, which on further thought will be found to have an applicability to the whole of them collectively. The discharge of cargo from a wreck lying on the rocks may seem to be a step taken only with reference to the individual benefit and safety of the cargo itself, and one towards which the ship could not be called upon to contribute. But if it be that it is impossible to get the ship off, or rather, to get the wreck away from the rocks whilst encumbered by the

cargo remaining in her, or if the weight of the cargo renders it probable that she will be broken to pieces where she lies, it is plain that the ship does really participate in the benefit of measures which were primarily undertaken for the salvage of the cargo. So again, the cutting away a ship's masts when she is a hopeless wreck may be very advantageous to the cargo in preventing the rolling of the vessel on the rocks, which would hasten her utter destruction and the loss of everything on board.

*Wages of Crew when detained to claim Ship and Cargo, &c.*

Although it will be seen hereafter that by English custom the wages of the master and crew are not generally chargeable in General Average, there is one case in which they are rightly admitted; and that is, when a ship having been captured or detained in a foreign port, it is necessary for the master and some members of the crew to remain with her for the purpose of making and substantiating a claim for her restitution together with the release of her cargo. But if the ship be only detained under an embargo, the wages are not allowable and remain at the owner's charge.

And so after collision, when all parties would be relieved from expenses and loss if the vessel doing the damage be made to pay for it, it may be well to retain the crew, or part of them, as witnesses, after the voyage has been completed and the owner ceases to be any longer bound to keep a crew on board, to

substantiate the claim for reparation. Here is a valid ground for charging the wages, &c., generally to the parties interested.

### *Compensatory Charges.*

Sometimes the General Average expenses which would have been incurred are not entered upon owing to some arrangement which may be economical to all parties concerned, but by which the transaction is cut short; as either by selling the ship or the cargo, or by breaking up the voyage. In such a case these frustrated expenses may well be taken into account in making an equitable adjustment among all the parties concerned: and an estimate, or *pro forma* statement, may give compensation to the one party upon whom primarily the loss falls.

So too, when to lessen certain general expenses some course is taken by which, virtually, the expense is thrown upon one of the contributing interests, it is quite agreeable with the spirit of these settlements to divide and thus equitably to adjust the charge.

### *Ex: Gratiâ.*

At Malta and at some other places the hire of warehouses on shore is exorbitant in price, or warehouse-room is difficult to obtain; and it becomes an easier and less expensive method to discharge cargo into covered lighters and keep it there. As a general rule it costs more to employ lighters for stores than to use warehouses on shore: but here the former

course is advisable. By not sending the cargo on shore a much greater expense is avoided in landing and reloading than arises when the merchandise is only put into and taken out of the craft. It is customary therefore, in adjusting, to divide the large expense of lighter hire, and consider a portion of it as equivalent to the increased expenses of landing and reshipping which might have been incurred if so determined on; and thus to charge to the cargo, specially, a sum representing warehouse rent only.

*Cutting through Ice.*

A vessel becoming ice-bound or caught in a drift of ice, and being thereby in danger, when relieved from her situation by the assistance of men cutting the ice and bringing her through to a harbour or clear water, the expense of so doing is to be borne by General Contribution.

The cutting through ice in more ordinary circumstances to enter or go out of harbour, was formerly classed as *Petty Average*, and the shipowner and proprietor of cargo paid it between them without reference to their underwriters. But latterly there has been a tendency to look upon this expense as more nearly approaching extraordinary assistance: and, if attended by any accessory circumstances of danger, it has been allowed as General Average.

OF CERTAIN DOUBTFUL, UNSETTLED, AND REJECTED  
SUBJECTS OF GENERAL AVERAGE.

*Wages of the Master and Crew.*

It is in the particular of wages and provisions for the ship's company during the time she is under average, that the English custom differs from the American and from nearly all foreign usage. As soon as a ship's head is diverted from her proper course for the purpose of going into a port of distress, and until she has regained her homeward direction after leaving port, the wages and provisions are by foreign practice chargeable in General Average. We reject this expense on the ground that an owner is bound by law to keep his vessel manned until she has completed her voyage, and that therefore he has not the option of dismissing the crew. All that can be said is that the protraction of the voyage is an unfortunate circumstance for the owner, but that he has not a remedy; that protraction may be equally unfortunate for the proprietors of the cargo, whose goods, if perishable, may be much depreciated by the delay; and they may lose their market from the same cause. Foreigners and some of our own colonists do not see the subject in the same light, however, and claim the wages and victuals in their adjustments. Many of our own insurance clubs have followed their example, and permit by their rules the wages of ships under detention to be allowed in the average, and they even arrange a scale *per diem* to remunerate the owner whose ship is detained. Although a vessel be

unfortunately detained in some port all the winter, ice-bound, the owner has no remedy against his underwriters, and still less claim for contribution from the co-adventurers, since there is no voluntary sacrifice on his part, but an inevitable necessity. The only question that can arise in the case is, whether this position is altered by a ship being ice-bound in a port where she has been obliged to put in by circumstances which make her expenses going there General Average. The answer is in the negative; for neither by our law or custom does detention, with the one or two exceptions I have mentioned, give any claim by which the owner can shift his burden on to others. The exception which Mr. Benecké proposes seems to me a distinction without a difference.

*Parts of a Ship used for Fuel.*

Before the whaling trade of this country in the North Seas was almost entirely abandoned, it frequently happened that ships were caught in the ice and remained fast-bound prisoners all the winter. Not always being prepared for this contingency, the crews were often put to serious inconvenience and suffering from want of fuel. When everything in the way of firing had been consumed, they were driven to make use of spars, boats and other materials to burn. It has been much discussed whether these do not legitimately form a subject for General Contribution. The lives of the crew would in all probability have been lost without this sacrifice, and the loss of the ship would in general have followed



the loss of the crew, whose lives therefore, even on the most sordid principle, it was important to preserve. But to persons most conversant with these questions the case does not appear to be made out sufficiently. It is one of those unfortunate situations where there seems to be no alternative, and the owner must bear the expense.

*Cutting away Things already Lost.*

Though to cut away parts of the tackle and apparel of the ship for the common preservation and by a deliberate choice is a most obvious ground for General Contribution, yet there is a cutting away which is not applicable to General Average. The great principle of looking to the *primary cause* of every act is the safest guide to direct us in the matter. If, therefore, a mast be carried overboard with the sails and rigging attached, and those objects might have been recovered and saved but that it became necessary, to prevent the wreck injuring the ship's sides and bottom, to cut the whole away, the loss of the sails is not the subject of General Average. The original cause is the accidental loss of the mast; and although the loss of the sails and rigging was made absolute and complete by the act of cutting away the wreck, the true nature of that loss must be looked for in the original incident, and the cutting away afterwards must be considered only the consummation of the inchoate act. So, too, when sails have been split by the wind, and in order to get free from them quickly and prevent their injuring the masts, &c., they are cut away, the

first cause of loss is to be considered; and the completion of their destruction, though voluntary, is a matter of mere prudence, hastening the entire loss of that which would be inevitably lost without the step taken but in a less expeditious and in a more dangerous manner.

So, too, a boat, or other article, broken adrift by the sea and beating about the deck, and thrown overboard because it is impossible to secure it again, is not General Average. The act is prudential but not elective, and so not entitled to General Contribution.

I do not say but that there are some exceptional cases which, approaching the circumstances mentioned, tend more to voluntary acts than simple necessary measures, and may properly rank with General Average. And there are a few instances where some division is capable of being made in the cost of the thing sacrificed, a part being carried to General Average, and a part applying to owners or underwriters.

#### *Ransom.*

I have already mentioned that a sum of money given to an enemy by whom a ship has been captured is held not to be admissible as General Average. This is excluded on the grounds of patriotism and national expediency, and not because it is inconsistent with the principles of General Average.

#### *Defending a Ship against Enemies.*

Nor are the damages received by a vessel whilst defending herself against an enemy claimable as

General Average; nor the cost of the ammunition expended; nor the expense of curing the wounds of the crew so engaged. The grounds of this conclusion are not very clear; nor why a merchantman casually obliged to take arms to defend itself should be less entitled to compensation than a regularly armed vessel. I should be rather led to the conclusion that a goods or passenger-carrying ship whose trade was not war, when suddenly put on its defence should be allowed to claim its losses, damages, and expenses of every kind even upon patriotic grounds and as an encouragement to owners, masters, and seamen, "to labour in and about the defence, safeguard, &c., of the goods, merchandises, and ship, &c.," as specially mentioned in the body of the Policy of Insurance; and also because I think this employment of extraordinary stores, provided only for such a contingency of violence, is perfectly analogous to the use and destruction of stores in certain cases for the general benefit and which are permitted to be claimed in General Average. And if it be argued that it is the proper use of powder and shot to be expended in firing at an attacking enemy, I say that it is only the foreseeing care of the owners that provided these serviceable ammunitions. Had the ship not carried them the owner would have saved their cost, and all parties would have lost their property; but by his providence and the expenditure of his stores the loss to all the co-adventurers has been prevented.

OF THE RULE RELATING TO THE CAUSE OF  
LOSSES AND EXPENSES.

The conclusion of this part of the subject is the most fitting place to return to the subject of a maxim which I merely touched on before, viz. that the proximate (we may read *immediate*) cause of loss, &c., is to be looked to, and not the remote one, in placing the onus. *Causa proxima non remota spectatur*. Now, in the first place, it is admitted even by the supporters of this dictum, that the exceptions to it are numerous: so that even they would have been wiser in not attempting to make it universal, but in being content to say, "In many cases," or even "in general, we are to look to the immediate and not to the remote cause." To maintain the opposite proposition, that the original or ultimate cause of loss is to be sought and is to decide where the onus should fall, would be even less difficult: and I believe the majority of cases where a rule can be applied will be found to bear this out. Thus in the instance of Barratry; the first cause of loss and that which decides the result is the master's or mariner's barratrous conduct, although fire, or water, or rocks, or custom-house authorities may be the immediate cause of the property being lost to its owners. So with unseaworthiness. If an owner knowingly send his ship to sea in an unseaworthy condition and she be lost, though sea perils are the immediate cause of that loss, the guiding one is the unseaworthiness of the vessel. Lord Campbell alluded to this very

circumstance in giving judgment in *Thompson v. Hopper* (Nov. 1856), and said, "the wrongful act of the plaintiff led to the loss, though it was not the proximate cause."\* So again when masts, rigging, sails, &c., which have been carried away are encumbering the decks or hanging in the water, and are then cut and cleared away, the proximate or immediate cause of their loss is the knife and the voluntary act which disengaged them, and this if looked to would class them in the category of General Average; but custom practically decides otherwise, and refers their loss to the original cause, viz. the force of the elements. I think it will be found, throughout, that we shall have to be led by another rule, viz., that in deciding on the destination of average losses and expenses we must be guided by the true and effective cause in which the loss or the expenses originated.

#### OF CERTAIN EXPENSES ENTITLED SPECIAL CHARGES.

Besides the charges which benefit all the interests at once and thus apply generally, there are others which belong in particular to one or other of the interests. The taking out of the Cargo when it is necessary for the repair of a ship is, we have seen, a subject of General Average; and so is its carriage and delivery into a warehouse or place of safety.

\* Since the first edition of this work the judgment in this case has been reversed. (Exchequer Chamber, July 1858.) Six judges upheld the doctrine of the proximate cause prevailing, and one judge dissented thereto.

But being there it remains at its own responsibility; and the rent of the warehouse, its insurance against fire, and any means taken to prevent it from being injured or to improve its condition when damp or damaged, are expenses chargeable specifically to the cargo itself. The expenses of survey on goods, carriage to a kiln to dry and back to the warehouse, are of the same character. So are new cases and bags, and the cooperage and other repairs of packages.

Then, to the Freight are charged the expense of conveying back the goods from the warehouse to the shipping place, the wharfage and quay dues, the lighterage on board, the labour reloading, stevadores restowing, metage at reshipment, use of screws for cotton cargoes, pilotage out of harbour, boats and men assisting, steamers towing out, &c.

And to the Ship are placed surveys and several charges which we shall speak of in detail when we come to the subject of Particular Average on Ships.

WHETHER THE FOREGOING SPECIAL CHARGES ARE  
RIGHTLY CLASSIFIED IN BEING EXCLUDED FROM  
GENERAL AVERAGE.

It is, and has been, usual to distribute the several charges just spoken of in the manner described. This is done upon the hypothesis that the consequences of an act of General Average, viz., the landing the goods, cease as soon as those goods are placed in safety on shore, and after that the several interests for a time are isolated from each other. But a serious

doubt may arise whether this view is correct;—whether it be right to divide the act of General Average; whether, in fact, a General Average arising from the necessitated landing of cargo is complete till the goods are back again in the ship, and the ship again on her voyage. On this supposition the General Average is only inchoate when the goods are landed. For it was not the intention in discharging the cargo simply to place it in safety, but it was done for an ulterior object, that of placing the ship in such a condition that she should be able to convey those goods on to their destination. Thus the safety of the ship was regarded, the conveyance of the cargo to its market, and the making secure the freight, which could not be secured except by delivering the goods as stipulated in the bills of lading. Why, then, should the custody of the goods whilst detained on shore be charged separately to them; or why should the freight bear the whole burthen of putting back the goods into the ship, when both these expenses are parts only of one design, whose object is the general benefit of associated interests? Why make a distinction which often presses heavily on one of the interests, and would naturally distribute itself more equally among them were the charge classed with the General Average? The answer to these inquiries will be, as before, that the *mediate* and ultimate consequences of an act are not necessarily in the same category with the act and its *immediate* consequences. But to show that this argument is only used when convenient, we may compare it with the reasoning on

an exactly parallel case, which is this :—If a cargo of corn or some destructible article heat from natural causes, and necessitate the ship putting into a port and the discharge of the cargo, in the generality of instances these expenses will be applied properly to the cargo, (because arising from its natural constitution) and not be charged to General Average.\* The storage goes, of course, to the cargo; and the reshipping expenses go—not to freight now, *but to the cargo* alone; because the landing was rendered necessary by the natural heating of the cargo. Observe, the storage and reshipping charges are resultants from the cargo's heating, and, *therefore*, the reshipping charges and outport charges must all be charged to cargo also, as that was the prime cause of their being incurred. It is not said that the cargo being once on shore and in safety it must be put back at the freight's charge, so that the freight may be earned—but that the expenses must be taken as a whole, and that the whole grew out of the natural processes of the cargo. Then why not apply such a rule to the reshipping charges, &c., on goods landed from causes which are the ground of General Average? Let all the expenses that are inherent to the separate interests,—such as repairs to ship, deterioration of cargo, and diminution of freight—be borne specially by the separate interests; but consider the expenses which are undertaken to set the ship forward on her voyage to be General Average.

\* Practically, the discharge of a grain cargo is nearly always made General Average, if a shadow of pretext can be found for considering the *original* cause for landing it a sea-peril. This is however sometimes done against principle, to get rid of a difficulty.



The Spanish commercial law on this subject, though completely opposed to our own practice, seems to me singularly logical. It proceeds on the principle that the *first* or *real cause* of expenses is responsible for *all* the consequences. If, according to this code, a ship puts into an intermediate port owing to a leak proceeding from inherent defect, the owner is chargeable with every expense until she have resumed her voyage. If she goes there from a necessity which we call Particular Average, the underwriters on ship pay the whole expenses. If the forced deviation arise from the state of the cargo, on the cargo all the charges are thrown. Finally, if the cause of putting into port be one in itself of General Average, as, for instance, if the crew had been obliged to cut away the masts, then all the disbursements and the repairs are claimable as General Average.

I do not say that it would be advisable to follow out the Spanish rule in its integrity, now ; but I think there is a great degree of consistency about it. Legal decisions bearing directly on General Average are now very infrequent. A judgment delivered one week before this volume made its appearance must, therefore, be considered valuable, as it goes to the principles on which the practice of General Contribution is founded ; and it is the more interesting because the judgment of the Court delivered in the cause of *Moran v. Jones*\* confirms the view which my text has encouraged, viz. : the inseparability of acts of General Average considered generally, and not by the sole light of technical observance. The decision

\* Queen's Bench, April, 1857.

would have been of greater value but for a circumstance which I shall have to mention and remark on after giving the substance of *Moran v. Jones*.

The *Tribune*, bound from Liverpool to Callao and the Chincha Islands, under charter, in ballast but with a few goods on board, struck on the East Hoyle Bank. One of her masts was cut away, but she became fast on the ground, and she was scuttled. Some of the ship's materials and the small quantity of cargo on board were sent in lighters to Liverpool, and were stored in safety. Part of the ballast was thrown overboard; after which the ship floated, and was towed back to Liverpool. The point really at issue was whether the expenses incurred in getting the vessel off and up to Liverpool were General Average, so as to affect the freight and make it liable to contribute towards them; and, further, incidentally, whether the cargo was likewise liable to contribute, because that incidentally affected the freight, inasmuch as if the cargo were a contributory it would reduce the proportion of average payable on the freight. Lord Campbell stated, as might be supposed, that the Court entertained no doubt as to the contribution of the freight, because all the costs of getting the ship off and up to Liverpool were necessary to allow her to go to sea again; and unless she could go to sea the freight was imperilled, and would have been a loss on the policy. But, what is more important, his lordship proceeded to decide as to the cargo; since, although the liability of freight was the question before the Court, the liability of the cargo

was involved as affecting the amount payable by the freight. And he proceeded to say, "It seems to us that the act of putting the goods on the lighter was only part of one continuous operation, viz., getting the ship off the bank on which she was stranded, and sending her to Liverpool, where she might be repaired, with the view to prosecute the original adventure. When she got to Liverpool the operation of saving her from shipwreck was completed, and the whole expenses of the repairs fell upon the owner, &c.; but the expenses of this continuous operation, for the common benefit of ship, goods, and freight, are the subject of a General Average." Again, "The goods were put into a lighter by the master of the ship, along with materials of the ship saved from the wreck, and they remained in the custody and under the control of the master till the ship was repaired, when they were reloaded in the ship and carried forward, without any interference by the owner of the goods, to their destined port. Unless it had been intended that an operation should have been undertaken and completed, by which both ship and goods should be rescued from the peril to which they were exposed, nothing might have been done, and the goods might have perished. Because the goods happened to be saved in the earliest part of the operation, this can be no sufficient reason for saying that they ought not to contribute to all the expenses of the operation, which contemplated the benefit of all the interests imperilled by the stranding."

So far the judgment of the Court is lucid and satisfactory; and if the dictum could be received pure and simple, it would be a great guide in the settlement of all similar cases and of analogous questions of average. But it unfortunately happens that the same learned judge had delivered himself, ten months before this judgment, in another case of singular similarity to that of the *Tribune*, in which he had come to deductions singularly different.

The trial of *Job v. Langton*\* related to the *Snowdon*. She sailed from Liverpool for Newfoundland with a cargo, got ashore in Malahide Bay; the goods were landed, and were forwarded to their destination by another vessel. When the cargo had been discharged, the ship was towed off by a steamer, a channel having been cut to facilitate her extrication, and she was taken to Liverpool to be repaired. The two cases seem, therefore, to proceed *pari passu*; with the exception that the *Tribune* reloaded her cargo and completed her intended voyage, whilst the cargo of the *Snowdon* eventually went forward by another vessel. This difference might have been supposed to constitute a valid distinction in the two cases, if one existed at all: but Lord Campbell waived it, saying, "We do not attach any importance to the fact that the cargo was forwarded by another vessel; and we should give our decision as if the *Snowdon*, after she had been repaired, had carried the cargo to its ultimate destination." He may, in consequence, be said to have made the facts of the two ships identical.

\* Queen's Bench, June, 1856.

His decision was, that the expenses of getting the vessel off and of taking her to Liverpool, *are not chargeable in General Average*. He supported this view by a long chain of argument, too extensive to introduce in the text of a manual like this; but I give the judgments in both cases in an Appendix (No. 8.)

It must certainly be considered very unfortunate that two decisions by a judge of such high authority should contradict each other, and leave a question in a state of greater uncertainty than before it was touched by him; but it may serve to show that where arguments of great force or of great delicacy can be urged on both sides, conclusions in such matters are not so irrefragable as to convince all persons; and that two minds may be led to opposite results in a manner equally satisfying to themselves, and that this may also happen to the same mind at different times.\*

#### OF THE MEANS OF RAISING MONEY FOR DISBURSEMENTS IN FOREIGN PORTS.

When an English ship under average is in an English port, the expenses are usually paid by the agent drawing a bill on the owner, who, by custom, is taken to be purse-bearer for all parties by whom the average will eventually be paid. Should the sum required be too large for the owner to meet, he sometimes procures a portion from the proprietor of the cargo, or, if he be insured, an advance from his underwriters. Arrangements relating to funds are

\* See Appendix No. 8 for a report of the trial.

naturally more easy to make when owners reside in the same country in which the average occurs, and where there are the means of communication between the master and his owner. Even in foreign countries, it frequently happens that a shipowner has sufficient credit for the agent or merchant disbursing average expenses on his vessel to be satisfied with a bill of exchange upon him without further security. I need not point out how advantageous it is thus to be able to raise funds, free from those expenses which an average often entails in procuring the means of defraying the disbursements. It is one of the many advantages which a merchant gains by shipping goods on vessels belonging to respectable owners, with sufficient capital for carrying on their business. But more often, and, indeed, in the majority of cases, the agent who advances the money for a vessel under average in a foreign country requires a greater security for his outlay of funds than a simple bill of exchange.

*Insurance of Disbursements.*

Sometimes the danger he fears is not the insolvency of the owner, but the subsequent loss of the vessel after leaving his port, and he contents himself with insuring the sum advanced against this risk ; in which case the premium and expenses of insurance are chargeable in the average statement, *pro rata*. This course is also taken not unfrequently by the owners or the insurers of ship or cargo ; as in case of the vessel's subsequent loss, they would have to bear both that loss and the previous average.

*Bottomry Bonds.*

A very usual manner of paying disbursements is by a Bottomry or Respondentia bond. A Bottomry bond is a bond which pledges the ship itself, instead of the owner's credit, for payment of the advances;\* and Bottomry Premium given on such a bond varies from five per cent. to fifty per cent., or even more. In its proper form it takes effect only at the termination of the voyage and at the place specified in the document; and, usually, three or more days' grace is granted for the captain and owner to satisfy the holder of the bond, after the ship's arrival at her destination. One of the conditions of such a bond is, that in case the vessel, by losses and accidents of the sea, never reaches the place to which she is bound, the bond is cancelled. This risk is frequently provided against by the lender of the money insuring the bond. There are other bonds which are given as collateral security for bills drawn on the owner; these are considered a spurious kind. They generally contain a clause that if the bills are duly honoured and paid, the bond is void, and the premium stated therein is not to be enforced. This non-enforcement of premium is sometimes the case with valid bottomry bonds,

\* This is the usual way of describing the security; but strictly speaking, it is incorrect. Bonds of Bottomry and of Respondentia are really written securities for loans made on the credit of the master, owner, and proprietor of cargo. The remedy is not against the things themselves,—technically speaking, not *ad rem*,—though proceedings in practice reduce it to much the same as if it were. The captain or other person who gives and signs the bond remains personally liable.

where the person advancing does not seek farther profit than his commission and agency, but requires a security. There are other bonds of an irregular and ambiguous nature; some of which are for time, and follow the vessel about; sometimes precede her, and are made the means of getting bills of exchange paid in advance before the ship arrives. Such bonds are exceptional, and do not fulfil the meaning or intention of Bottomry.

*Respondentia Bonds.*

Sometimes, and very frequently, the freight and the cargo are included in the bond, and then it is called a Respondentia bond, or bond of Bottomry and Respondentia. In this case the holder's lien is first on the ship itself, next on the freight, and lastly on the cargo. The bond gives the holder the right, in case of nonpayment, to sell the ship, confiscate the freight (out of which, however, the seamen's wages must first be paid), and then, and lastly, to sell as much of the cargo as is required to make up the sum of the bond with its premium unsatisfied by the two former means of payment.\*

If more of the cargo is sold than is necessary to pay that part of the bond which applies to the cargo, the remedy of the proprietors of cargo is personally against the shipowner.

It is needful that a lender should exercise care in making advances on bottomry. He is not by his facility to encourage a shipmaster in an extravagant

\* See foot-note, page 68.



expenditure. He must ascertain by inquiry that the loan demanded is really wanted for the necessities of the ship; and advertisements for bottomry must state the object for which the money is required. After this preliminary inquiry, it is not pretended that the lender is bound to see to the application of the money—how it is actually expended.

When two or more bonds are given on the same voyage the last takes precedence, and so on in a retrograde order. The last one being satisfied, the penultimate takes what is left, &c. There is one exception, however. If after a bond has been given the captain obtains a credit from his owner, and then gives a subsequent bond, the first, in this case, takes priority.

It has been thought that it is illegal to lend on bottomry to an English ship in an English port; but in the case of *Arthur v. Barton* it was decided that the master of a coasting vessel could bind his owner residing in England by a bond given in one of our own ports.

If a bond is oppressive from exorbitant interest, &c., or bad in itself, the Court of Admiralty can give protection and relief from it. And where the Admiralty Court was made use of to enforce a bond which was fraudulent, a court of equity has jurisdiction, and will stay proceedings.\*

The general name of thus dealing with the ship, freight, and cargo for the purpose of raising money is Hypothecation; a name which marks the distinction between absolute power over person and property by means of a bond in usual form, and the contingent

\* *Glascott v. Lang.*

or hypothetical right given by these instruments, dependent on the arrival of the ship at a specified place.\* Should the vessel be wrecked, or sold on account of further damages subsequently received ere she reach her destination, the bondholder must receive the net proceeds of sale in part satisfaction of his security. It is needless to say that by no voluntary act affecting the non-arrival of the ship at her destination must the bondholder be deprived of his right.

### *Sales of Cargo.*

But Bottomry being at best an expensive means of raising money, a shipmaster is bound to circumscribe the sum borrowed as much as possible. He will therefore apply the sale of any condemned stores of the ship, and the proceeds of any damaged goods, part of the cargo which surveyors have recommended to be sold on the spot, in diminution of the amount of his disbursements. And sometimes it is impossible to raise money at all on bottomry, and sometimes the rate demanded is so high as to appear ruinous, and other means for obtaining funds are resorted to. A captain under such circumstances may proceed to sell a portion of the cargo; but he has no right to sell an entire cargo at an intermediate port to raise funds to repair his vessel.† He has the same right to sacrifice a part that the remainder of the interests may reach

\* The word is immediately derived from the Latin noun *hypotheca*, a *pledge*; which itself means some article of value conditionally placed in the keeping of another person to secure a loan, or to serve a similar purpose.

† *Heydora v. Bibby. Exchequer, June, 1855.*

their destination as he has to throw a portion into the sea to procure the safety of the rest. He will in this matter, as in all others, exercise discretion, and he will not dispose of more than is absolutely needful. The loss on such a sale will form an item in the average adjustment and will be applied to the columns of disbursements *pro rata*. The loss is discoverable by making up a simulated account sales, as if the goods sold had arrived in a sound state, from which the actual sales will be deducted. In settling with the proprietors of cargo for the average, the sound value of their goods sold will be set off against the amount claimable from them for General Average and charges.

BY WHOM, AND AT WHAT TIME, GENERAL  
AVERAGE IS TO BE PAID.

I have already stated that the instant a sacrifice has been made or an expense incurred for the general good, it becomes a debt due by all the benefited parties to him by whom the loss is sustained or the disbursement has been made. But a contribution by all parties towards that loss or outlay may not be, and generally is not, convenient or even practicable at the moment, and it must be deferred till some after-time. That time is usually the arrival of the ship at her port of destination; and this for several reasons. First, because there the proprietors, or representatives of proprietors, of all the property will be found; there the proper persons are generally to be met with to adjust the claim in a *Statement*, and supply the

legal or notarial documents that are required ; there, too, a uniform scale of value can be adopted as the basis of contribution ; and, lastly, there the means will exist for enforcing payment should any of the contributors resist the claim for their quota.

The persons who should contribute are, primarily, those to whom the property actually belongs : but consignees, factors, and agents may also be asked to contribute for the goods under their charge ; and in general they will have the means, out of the goods in their possession, of making repayment to themselves for the sums contributed in respect of those goods. But if the captain or owner or agent of the ship finds there is likely to be any withholding or disputing payment of the General Average, he may refuse to deliver the goods, until he is satisfied that the receivers will pay their proportion. And, in order to facilitate matters and avoid delay, especially in cases of perishable cargoes, it is common for the receiver of goods to execute a promissory document called an Average Bond, drawn by a solicitor or notary, engaging to pay his proportion of the General Average, as soon as that has been ascertained by an Adjuster, on the condition of immediately receiving the goods to his address. Such a bond is by no means necessary. In reality it adds nothing to the obligation the proprietor, or his representative, is under of making good his share of the Average Contribution, because that share is a debt already due, and recoverable by action at Common Law. Nevertheless, practically, the signing a document seems to a captain or owner an addi-

tional guarantee ; and it must be owned, that the formal recognition in writing of a prescriptive right frequently prevents dispute or discussion of that right. To those persons who are properly advised on the subject, or who are themselves aware of the law and practice, a saving can be effected of the expense of the bond by substituting a simple letter, signed by the receivers of cargo to the shipmaster or owner, containing the same conditional promise. Other persons, still more informed or still bolder, will proceed to deliver the cargo without any such undertaking at all. On the whole, I think there are many cases where a promissory letter is advantageous, is a saving of time and a preventive of disputes.

If the occurrence which gives rise to a General Average happen in an early part of the voyage and occasion the return of the ship to her port of sailing, or some other port accessible to the owner and the shippers of the cargo, it is often convenient that the General Average Contribution should be made there, and not delayed till the vessel's arrival at her destined port. In this instance a different value must be set on the contributing interests. It will be the cost of all of them at the time of sailing, less any diminution of value by the accident or sea damages. And although this is not strictly the correct method of valuation there is little to object to it, since all the interests are subjected to the same treatment. As to the freight, an exception is made in its favour, and an estimate is formed of what it would produce net when the voyage shall have been completed. It

is remarkable that this and every other procedure about freight is exceptional and erroneous. I shall have to enter upon the subject when hereafter considering freight as an interest.

*Who is to Collect the Average.*

But there must be a collector or receiver of the General Average. Somebody usually has made all the disbursements, and to him they must be refunded. And even in the case of jettison, where the goods of various proprietors may have been sacrificed, and, as such, become a part of the amount to be made good, there must be some one to stand as a central point representing the loser of those goods which were thrown overboard, to receive back those blended losses by the General Contribution, and afterwards to account separately to the several parties whose goods have been sacrificed. In the majority of cases this receiver is the shipowner or his agent or the captain. It is in general held that the owner should provide funds, not only for the ordinary expenses of the voyage, but, in the first instance and till reimbursed, for any extraordinary disbursements which may be rendered necessary during that voyage. This responsibility is a heavy one, for Average disbursements may be required larger than the owner's means or his powers to raise. But the effect of it is, that the shipowner, master, or ship's agent is usually the receiver of General Average. Sometimes, however, as in the instance just referred to, another person undertakes the disbursements; frequently the pre-

prietor or agent of the cargo. And sometimes the outlay is made by more than one, and the subsequent arrangement of accounts becomes proportionally more intricate. In other instances, agents at outports of England where vessels have put in under Average, collect the contributions themselves as being a safer method of securing their advances than by taking the captain's bill on his owners, &c. And occasionally agents go a step further, and arrange the Average statement themselves;—a proceeding which nearly always leads to inextricable difficulties; for as it nearly invariably happens that they commit some mistake either in the distribution of the expenses, or the contribution towards them, and some party interested is afterwards obliged to rectify the statement, the agent having received the sums and closed the accounts has locked the door to any correction; for if one contributor discovers he has been made to pay too much, it implies that the excess must be recoverable from the others; but they have already closed the transaction with the agent, and he has received his discharge.

*Average settled in a Foreign Port.*

If the ship's destination be a foreign port, the settlement of the Average usually falls under the jurisdiction of the national, legal, or commercial tribunals, and must be paid according to their decision. In general, foreign codes are more liberal and comprehensive in their views of General Average than our own law and custom, and bring into General

Contribution expenses which in this country are excluded from it. It is, consequently, more advantageous to the shipowner to have an Average settled in a foreign port.

When proprietors of cargo have been obliged to pay in General Average adjusted in a foreign port, expenses which are not claimable here under that head, the settlement is binding on them, and they cannot recover back from the shipowner afterwards the difference between what they have been compelled to pay and what they would have been liable for under an English adjustment. In *Simmonds v. White*, repairs to the ship were included in the General Average, which is contrary to our own law and custom; nevertheless, the plaintiffs who had been compelled to contribute in St. Petersburg could not recover back from the owner. The decision in *Dagleish v. Davidson* confirms the same rule.

*Disbursements secured by a Bottomry Bond.*

When Average disbursements have been discharged by a bond of Bottomry or Respondentia, the person who satisfies that bond at the port of destination is entitled to collect the General Average.

OF THE CONTRIBUTING VALUES OF SHIP, CARGO,  
AND FREIGHT.

*Value of the Ship.*

The value of the ship for contribution is her value at the time of her arrival at the termination of the voyage: but if she have met with damage and have



been repaired before arriving at her port of destination, the value to be taken is her worth previous to such repair. It is very difficult to fix the true value of a ship, because the price of shipping is continually varying in the market according to the supply, rate of freights, and other causes. Also, the value of a ship is not precisely the price for which she would sell if forced to a sale by auction, and, consequently, not always that at which a surveyor would estimate her,—for he must necessarily have that test of value in his eye. A ship in her owner's hands who has a regular trade or a freight ready for her has a real value greater than the sum which a buyer without these advantages would be ready to offer;\* and I think we have no right to assume that a sale by auction demonstrates her true absolute value, for that consists of the price of the thing itself connected with certain advantageous circumstances.

But where parts of the ship have been sacrificed for the general benefit, and the cost of them is made good in the Average Contribution, the amount of such *bonification* is to be added to the value of the ship, upon the same ground that the value of goods jettisoned must be made to contribute to the jettison itself.

\* A ship, in the eye of the law, is not like a mere commodity, such as sugar or cotton, the true value of which is simply that for which it will sell; but it is a chattel to which are attached uses and capabilities of profit which go along with it and are inseparable from it. It has, therefore, like several other things, an intrinsic and an adventitious value, both which are very difficult to determine with nicety. In order not to overstate my meaning, it is necessary to add that by law only incidents pass with a ship, for no contract runs with a chattel.

The value of the cargo is what it has produced, or would produce, at, as nearly as possible, the time of its arrival. If it be actually sold there can be no truer value given for contribution than the net proceeds of the sale;—that is, the gross amount stripped of freight, duty, landing and all other charges, and brokerage. The only charge which should not be deducted either from a contributing value or from a value of goods jettisoned is the merchant's own commission; because that, which is his expected profit, was jeopardised when the goods themselves were in danger; consequently he was benefited *quoad* the commission by the means which form the General Average.

If the goods be not sold, an estimate must be formed of their value, and they must be treated in the same manner as if they had been really sold. This is called a *pro formâ*, or simulated, account sale.

In every case it is strongly to be borne in mind that it is *real* and not *fictitious* values which are to be adopted, and that the value given in for contributions is not to be affected by any value assumed in a policy of insurance. Some persons from ignorance, and some designedly, give a value for contribution which is just within the policy value, so that all the General Average they are themselves called upon to pay may be recovered from their underwriters. I need hardly point out that when this is the intention of the assured in giving in a smaller than its real value the act is simply dishonest; it is forcing on the

other contributors a proportion larger than what is due by them.

The value of goods jettisoned is to be added to the value of what arrives: but to prevent mistake in the adjustment, it is better to show the distinction between the two.

When freight is paid in advance, as it frequently is in shipments to our colonies, it is to be added to the invoice in cases where the shipping values are resorted to.

In this case, the special charges for re-shipment of cargo which has been landed, usually called charges on freight, will be paid not by the owner but by the shippers of the goods: for, by prepayment of freight, the owner has no longer any risk in that respect; nor does it signify to him whether the voyage be completed or not. On the other hand, it is necessary to the shippers that the vessel should proceed on her voyage, and they will have to pay the expense of effecting this object. This must now be considered the settled practice, although in principle it seems objectionable, inasmuch as the shipowner is relieved of a duty he undertook,—that of conveying the goods entrusted to him to their destination: and he ought not to be relieved from this obligation because he happens to have been paid beforehand, but, on the contrary, ought to do everything in his power to deliver the goods at their destination as contracted by the bill of lading. Where part of the freight is paid in advance, and part depends on the completion of the voyage, a partition of the charges must be

made ; for both owner and shippers have an interest in again sending the vessel to sea.

The value of the freight for contribution is the amount the ship earns, stripped of the captain's and crew's wages for the voyage, brokerage, harbour and light dues, and all incidental expenses. The victualing of the crew is, however, not to be deducted. This looks at first sight an anomaly, and often calls forth remark ; but the reason for the exception is, that the crew's provisions are ship's stores, and are included in the value of the ship. I cannot say that this is a very consistent arrangement, but it is the existing one.

If a ship is chartered out and home, in one charter, and she meets with a General Average on the outward voyage, the whole freight for the round must contribute. If the Average happens on the homeward voyage, then only the freight at risk at the time is to pay its contribution.

Underwriters on freight gain a great advantage by the manner in which it is made to contribute ; the contribution to Average being on the *net* amount, and the premium received being on the *gross* amount of freight.

When a vessel has been re-chartered at an improved freight, the re-charterer is to contribute on his surplus or profit freight.

When an owner employs his vessel on his own account, there is no true freight on which to contribute to General Average : but the increased value of coals or other commodities in which he deals stands in lieu of freight.

When original values are taken for contribution, the wages and expenses for the intended voyage must be estimated.

Passengers' personal effects and money do not contribute to General Average.

Government stores contribute, like other goods; but in general on cost price, as they are not shipped for profit.

If it becomes necessary to break up and abandon a voyage begun, the freight is thereby lost, and has not to contribute; but there are cases in which an owner for his own convenience or profit determines to abandon the voyage, though not actually obliged to do so. If this be his choice he must still contribute to General Average; since it is not at his option to withdraw a portion of the contributory value to the prejudice of the other contributors.

If when a voyage is abandoned the master or owner determines to forward the goods by other means to their destination, and thereby to secure his original freight, whatever he saves of that original freight must contribute to General Average.

*Advances on account of Freight contribute.*

It has been commonly maintained, hitherto, that advances of money made to a captain on account of freight are not to contribute to General Average. But in the recent case of *Hall v. Janson* in the Court of Queen's Bench, it was held that a custom alleged to exist in London that assurers of money advanced on freight were not liable to make good a General

Average loss was no answer to the action. What the nature of an advance to the captain before the ship's sailing is, depends almost entirely on the manner of making it. If it is simply an advance for expenses, it is not an insurable interest in the eye of the law, but is a personal debt of the owner not dependent on the safety of the ship.\* If, however, it be clearly stated to be advanced *as part of the freight*, it is insurable as such; for in case the ship be lost, that freight paid in advance is lost also, for it would not be returned by the shipowner. In fact it might be put in the light of the person so advancing having purchased a share of the freight; and therefore the owner has no right to insure the portion advanced,—for *the same interest in all its rights* cannot be insured twice. I am here anticipating the subject of Insurance, which is to be treated of hereafter; and I do so because it is so much connected with the matter of *contribution on advances* and the common belief concerning it. Indeed the current opinion about this subject at Lloyd's appears to be just contrary to the fact, for it is commonly stated that advances, *eo nomine*, are an insurable interest, *but that money advanced on account of freight is not insurable* by the merchant or his agent: in conformity to which opinion advances are very usually insured in London and elsewhere. But the truth is discoverable by deciding the question, Whose is really the risk of loss by sea perils on these advances? On whomsoever that contingency rests there remains also the right to provide against it

\* And see Arnould, p. 261.

by insurance; in other words, he has an insurable interest. Moreover if that interest be such as to be subjected to danger of loss, it is interested in any means taken to avoid such loss,—it must contribute to General Average. This conclusion required, however, to be confirmed by legal decision, as distinctions are made about contributing interests which mere reasoning would not apprehend but which produce exceptional subjects; such as are passengers' effects, jewels and money,—these not being liable to contribute.

AS TO THE LIABILITY OF ENGLISH UNDERWRITERS  
TO PAY GENERAL AVERAGE ACCORDING TO  
FOREIGN ADJUSTMENTS.

I am again obliged for a few minutes to anticipate a part of the subject which I shall have to enter upon methodically hereafter, — I mean Insurance. But it seems less inconvenient to make the connection here than to go backward to General Average after we have finally left that division of the subject-matter.

I have already stated that the original parties to an adventure, when a ship is bound to a foreign port and meets with an accident that gives rise to a General Average Contribution, are obliged to settle their proportions of that Average as it is adjusted in the place of destination. The master can withhold from the receivers of cargo their goods until they pay or arrange to pay their quotas of Average. In some countries the contribution is arranged and settled authoritatively by Tribunals of Commerce or

official *Dispatcheurs*. But the question which arises is, whether when ships, goods or freight have been insured in England, the underwriters are bound by those foreign settlements. There is, or I should perhaps rather say there was, a strong conviction to the contrary. It was known that by most foreign adjustments the column of General Average comprehended items which would be disallowed by our own custom; and that therefore the insurers of ships sometimes, and the insurers of goods nearly always, are prejudiced by admitting a foreign statement as binding on themselves. That this was the case is shown by the practice which gained ground with many shippers, of introducing into their policies the condition that in case of General Average the underwriters should pay according to the foreign statement. The introduction of the clause is plainly indicative that underwriters were not bound to notice foreign adjustments without the proviso. The motive for introducing the words is sufficiently obvious; for proprietors of cargo are themselves obliged to pay Average according to the laws and regulations of the foreign port, which generally makes their contributions greater than it would be by a re-adjustment made in our own country, and consequently they have themselves to sustain the loss of that part which they cannot recover on their policy by an English statement. The underwriters argue, and very plausibly, that the undertaking called the policy is an instrument which binds by the laws and customs of the place where it is made; by those laws and



customs it is to be construed, and by them only. Some of the assured hold on the contrary that the mere *jus loci* of the contract is not to circumscribe their indemnification; that it is in accordance with the spirit which animates the system of insurance that they should have, under a policy, an *ample* indemnity against all risks; that variation in the laws which in foreign countries regulate Average Contribution is one of the risks; and that as the insurers know the port to which the ship is bound, they must take that contingency into account in fixing their premium. Impressed by the force of such an argument, underwriters have in many instances of late given way to it, and have paid Average on foreign adjustments upon this special reason, that had they been requested, they would have introduced the foreign General Average clause into the policy without asking any additional premium, and it therefore becomes a matter almost of indifference whether it is introduced or not. This silent manner in which precedents are established and customs grow up, is, however, very dangerous. When a *quasi* custom begins to obtain, competition soon makes it binding on others who do not admit the principle, but who may by disputing it be placed in invidious contest with their more facile competitors. "Custom ought to have no weight when inconsistent with equity," says Lord Kames, and I confess that I look upon the concession of paying on foreign statements when there is no foreign clause as a hazardous admission. I could adduce in analogy the case of probates and letters of administration, which must be

taken out in the province where the will was made or the effects are administered, but are valueless when granted in another province although the deceased had lived in it at the time of his death. In the place where a contract is made it ought to be construed.

Arnould effectively decides, against my view, in favour of payment on foreign statements. He says an English underwriter is bound by a foreign adjustment *when rightly adjusted according to the laws and usage of the foreign port*: but unless it can be clearly proved that it was in strict conformity, he is not bound. He relies on two cases cited by Park, Newman *v.* Cazalet, and Walpole *v.* Ewer. The latter seems to have been decided against the defendants on a technical point; for Lord Ellenborough said that there must be an allegation of the fact as to law and usage, but here the declaration contained none. Sir J. Arnould then continues, "it appears an almost unavoidable inference from these expressions of Lord Ellenborough, that where ship and goods are insured for a voyage from this country to a foreign port, and sufficient evidence is given of an invariable usage at such port to adjust, as General Average, losses which are not so in this country, the English underwriter is bound thereby, on the ground that he must be taken to have notice of the usage prevailing at the foreign port to which the contract of insurance relates, and by reference to which it ought to be construed. He must have contemplated the possibility of the interest having to pay Average in a foreign country." See Arnould, p. 944 *et infra*.

Now it will be observed that in these remarks of the learned writer on Insurance two things are involved:—First, that in an action against an underwriter for recovery of the sum contributed by a foreign Average adjustment the burthen of proof lies with the plaintiff to show that that adjustment has been made up in strict conformity with the law and usage of the place. And if the adjustment has been made in a place little known or not much frequented, and the defendant should traverse and allege that the adjustment is not in conformity, &c., and so put the plaintiff on his proofs, it might be highly difficult to bring the necessary evidence, and it might even require that he should send a commission to that foreign place to establish the fact; the expense of doing which might deter him from proceeding. No one asserts that an underwriter is bound even by an English adjustment unless it be a correct one; but supposing the foreign adjustment to be correct, this writer decides that it is binding on the underwriter. And he justifies this decision by an argument, in the second place, which is of large application,—viz., on the implied notice which the underwriter is taken to have of the prevailing law and usage of Average in every port and place which is the *terminus ad quem* of any voyage a ship which he insures may be on. Now, were this principle applied to every other circumstance relating to an insurable interest about which there is the possibility of the underwriter procuring information for himself, *i. e.*, about which he is taken to have notice, it appears to

me that he would rarely be in a position to defend himself in any case of *suppressio veri* or of misrepresentation.

The value, however, taken in foreign statements is not held to be binding on the English underwriter who has even agreed to the foreign Average clause, or who interprets his liability most liberally. He will only pay on a value within, or co-extensive with, the value insured; for it would be irrational to suppose that a shipper who only partially insures his goods should have all the benefit which he might have secured if he had paid for an insurance on the full amount of his interest.

## PART THE SECOND.

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### OF AVERAGE CONNECTED WITH INSURANCE.

#### OF INSURANCE ITSELF.

WE have now arrived at that point where Insurance enters as an essential part of the subject,—in fact, becomes the groundwork of all that has to be said about it. With regard to General Average, which is, as I have shown, a contribution made amongst certain persons whose interests are associated for a particular period or in a particular adventure, Insurance may or may not be connected, but it is not a necessary accompaniment. Here, on the other hand, the contract by which one person binds himself under certain limitations and conditions to take on himself a definite risk belonging to another, is the first cause of every question that can be agitated about Average.

It is not my intention to enter very largely or minutely on the subject of Insurance, which is one so extensive that the learned persons who have written upon it have filled volumes with the theme. These writers have looked on Average as a subordinate part only of their design;—an important one, it is true,

but still either as a part, or a collateral subject. We, on the contrary, proceeding in the opposite direction, must consider Average both as existing with and without Insurance; and in the light by which we must view it, Average may be compared with the trunk, and Insurance with a large and material branch proceeding from it. My remarks on Insurance will be confined to giving a general but definite notion of the system. Its particular features will come under observation in the subsequent pages of this volume.

Insurance is a system by which some classes of loss sustained by one individual are borne by many individuals. The essence of Insurance is the subdivision of a given risk or contingency. The object of all Insurances, whether Marine, Fire, or Life, is to distribute and equalize losses. It is not pretended that Insurance can *prevent* losses. Shipwrecks and fires and deaths will take place whether the property or the person be insured or not; but by the system of Insurance, the loss when it happens is so divided among many persons that it falls lightly, and is comparatively unfelt among them; whereas were it borne by one sufferer it would be heavy or ruinous to him. In the words of the Act of 43 Elizabeth, cap. 12, quoted by Maude and Pollock, "Whereby upon the loss or perishing of any ship there followeth not the undoing of any man, but the loss lighteth, rather, easily upon many, than heavily upon few."\*

That which is paid for so great an advantage is named the *Premium*, or the price of Insurance con-

\* Comp. Law of Merchant Shipping, p. 199.

sidered as a purchaseable commodity. Those who deal in Insurance are to live by it, as is expected by the vendors of every article of commerce. It follows, then, that not only must the premium be an equivalent to the risk run, but it must be something more; it must have a sufficient margin beyond the risk, to provide a profit for those who sell this species of security, and to meet the ordinary expenses of carrying on their business. From which this consequence flows, that a person constantly insuring loses as much, nay more, than one who does not protect himself; but with this distinction,—that he loses piecemeal, little by little, in a manner known and expected and so provided for, whilst the other, without the wholesome check of a constantly outgoing expense, loses wholesale, at a moment that cannot be calculated on and in a way that may overturn all his expectations. By Insurance the premiums become as much a part of the price of an article when sold as do the freight and any other charges; so that, again, the loss is subdivided, and it falls in infinitesimal portions on every purchaser in the whole community. Insurance Companies, and Underwriters, as the separate Insurers are called, act, therefore, as a savings bank does; they are useful in being the means for a gradual accumulation towards losses, and providing the fund at once when it is called for. If it be urged that Insurance Companies defeat the object, as I have stated it, of the system, because a single company will often insure the whole interest which a shipowner or merchant wishes to cover, and that,

therefore, when the loss comes, it is still paid by one individual office,—it is to be answered that the company itself is only the working medium of an aggregation of individuals, its shareholders, and that each loss falling upon an office falls in detail in small quantities on each proprietor.

The rise of the system of Insurance entirely altered the aspect of commerce. The olden merchant, the man who traded before this advantage had developed itself for his use, was always in danger of being ruined by accidents of the elements, and might be reduced to beggary by the sinking of his rich argosy. He, as a general rule, travelled with his venture, and therefore must have been a hybrid between a capitalist and a seafarer. Now, there are few Antonios, few Merchants of Venice, whose lives even may be jeopardised if the winds and waves prove treacherous. There are none except by their own choice. It is true that some very extensive shippers of goods and some owners possessing a large fleet of shipping run the risk themselves by not insuring ;—*but then they do it on the very principle* of which we are speaking ; it is because their property is dispersed in many bottoms, one ship sinks and another swims, and the mass is kept safe by one vessel or one portion of goods insuring another. The shipowner or the merchant thus becomes his own Insurance Company ; and as there is necessarily a profit supposed in the system of Insurance, so he, by keeping account of the premiums saved which might have been paid, and the losses he actually sustains, may find an advantage



in the course he pursues. But the plan of running the risk when transactions are very limited is bad economy and is highly to be deprecated.

*As to whether the Policy of Insurance is a Contract of Indemnity.*

This is the often recurring question, the point upon which assurers and the assured are so frequently at issue; and it will be well to say a few words on the subject before proceeding further. A policy-holder sometimes says in reference to a claim he has on his insurers, "Have you not granted me an indemnity? Do you not stand in my shoes? If you do not deny this, all the loss and the expense which I suffer in respect of the subject-matter of this insurance you must pay; otherwise I am not, according to my idea, insured; it is no use to insure; the premium is thrown away," &c. The underwriter denies that he ever took upon himself by his contract this plenary kind of Insurance; but the assured is confirmed in his view by finding it stated in some writers on the subject that a policy is a contract of indemnity.\* The difficulty arises from an unguarded use of terms, or, rather, from the use of a vague expression. The truth of the matter is, that a policy is a writing of indemnity *in a limited sense*; it is an indemnity restricted by certain conditions and provisos. Perhaps in this light the assured will say, then that is

\* So in the late case of *Dalby v. India and London Life Assurance Company* the judge said, "Assurances on marine risks are contracts of indemnity."

not what he understands or means by an indemnity. Probably not: in which case it is a pity that the term should be used at all; for words ought to convey definite ideas, and not to be subservient to confusing them. Yet there is no mystery in the matter. The contract when calmly considered is a very reasonable one. The underwriter or insurer agrees for a stated premium to take upon himself certain risks or contingent liabilities that affect the interest which the proposer wishes to insure. What those risks are is to be determined, first, by the policy itself, which states them concisely; and those risks which do not fall under its enumeration either expressly or by implication are excluded by the insurer. It is true that the list ends with a general undertaking, which leaves the door very much open to questions upon its meaning, in the words "and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises and ship, &c., or any part thereof." So that, secondly, it is necessary to have some other exponent of what the exact risks are which the underwriter engages to protect against. And this definition must be made by law and by usage: the former to be gathered from the writings of jurists and the decisions of courts, the latter from the experience and knowledge of persons conversant with the somewhat fluctuating rule called "the custom of Lloyd's." By the scale of premiums given, and by the introduction of conditions, an indemnity more or less complete may be agreed upon. There are many policies now which stipulate

that whatever sum the assured may be called upon to pay by foreign adjustments of Average shall be repaid by the underwriter. There are policies in which even the solvency of the underwriter is guaranteed. On the other hand some insurances are against the risk of total loss or some other contingency, only; and other policies contain various special clauses telling for or against the security of the person insured. So that the question resolves itself into a matter of premium or price; and *indemnity* is not to be considered as being an absolute and indisputable thing, an univocal term, but a matter capable of degrees, and one which may be rendered more or less complete; yet I think never quite so as to place the insurer in every possible situation, with respect to loss and contingencies, in which the assured himself might be placed as the possessor of that ship or merchandise or other interest. Indeed, when the technical nature of the conditions is considered on which a claim depends,—in respect of stranding, for example,—or when the arbitrary deductions of thirds from claims for repairs of ship are remembered, it will be acknowledged that the indemnity granted under a policy of insurance is only a limited one, and that on the bare term of *indemnity* itself no argument should be raised.

#### OF THE POLICY.

The form or instrument by which Insurances are effected is a time-honoured and quaintly-expressed document, which might be very advantageously

altered and modernised, but from the fear felt by some persons respecting the legal decisions which have been given on nearly every sentence of it, and many of which hang on a particular word or phrase. However, besides the old form, which I am about to give entire, there are now variations of the policy in use. The first varied reading was introduced by commercial men who objected to the use of the sacred name, which occurs twice in its text, and which also is found repeated in that short agreement called the Bill of Lading. No doubt in former days, when the safety of the ship and goods was so intimately connected with the life of the merchant and owner, the adjuration was used with a religious feeling; but now, in the change of times and with the expansion of commerce, such expressions are a mere form, and, in many people's minds, an irreverent one. Other slight changes, too, were made to adapt the policy to English insurance companies, and to those societies in India which have their head offices in the Presidencies; and, more recently, by the shipping associations or clubs established for the purpose of mutual insurance in many places along the coasts of Great Britain. The latter, although they take the old policy in general for their basis, attach to it a paper of special conditions or rules which have been agreed upon by the members and which considerably modify the contract, and differ in nearly all the clubs. "It is very probable," says Mr. Marshall, "that the form of a policy of insurance, nearly similar to that which we have now in use, was introduced into England by

the Lombards,"—consequently five or six centuries ago. This writer designates the policy as "extremely inaccurate, and unskilfully framed;" and Mr. Justice Buller said of it that "it has always been considered in courts of law as an absurd and incoherent instrument." However, my object at present is not to find fault with the prevailing form of policy but to describe and explain it. Two especial points are necessary to its validity as a legal instrument. It must bear an adequate stamp, and it must recite that the consideration, that is the premium, has been received by the insurers who underwrite it. For this document is not like a lease or other mutual agreement to which both parties concerned affix their signatures; it is of the nature of an undertaking by one party who alone signs it.

The policy, it will be seen, consists of a printed form interrupted by spaces, in which is written the special matter of each individual case; such as the names, dates, and places, species of interest, rate of premium, and all particular conditions which are to form part of the agreement.

With regard to conditions three things are to be especially observed, because they have been laid down by the highest authorities. They are,

First, — That a written agreement overrides the printed one when the two are oppugnant.

Secondly, — That those special written clauses, such as that called the Average clause, are *cumulative*, and *not restrictive*. That is, that they are *farther concessions to the assured* beyond what he can demand by

the bare printed policy, and are not to take away any privilege he had before their introduction.

Thirdly, — That conditions are to be construed against the party for whose benefit they are introduced.

These two last dicta of eminent judges are not contradictory of one another, as a superficial reader may suppose, but are an instance of the refinement that has been arrived at in the science of justice.

The policy, such as we find it, being of such important and universal use, it should never be forgotten that in its interpretation no sophisms are to be allowed. Within its four corners the objects and scope of an insurance are expressed in printed and written words. Where a written clause does not oppose the printed form, but runs in the same direction, the variations introduced by the assured are cumulative or additional benefits to the holder of the policy. The law looks at it in this manner, and is very jealous of allowing an alleged custom to defeat a distinct contract. In cases of doubt, or when words of vague meaning have been used, the custom of Lloyd's, or of a trade, may be advantageously adduced. It will be received in Court and before arbitrators, and will be taken into consideration by an Average Adjuster in stating the claim on a policy.

The policy consists of three parts ;—the body ; the memorandum ; and the signatures or subscriptions.

After having given this very well-known instrument at length I shall, in proceeding with my subject, endeavour as much as possible to follow the order in which the matter to be elucidated and discussed is

there arranged. For the sake of generalisation I must here and there deviate from this rule, but it will be convenient to adhere to it as nearly as is practicable.

#### COMMON FORM OF POLICY.

"S. G.\* IN THE NAME OF GOD, Amen.

"As well in                      own name, as for and in the Name and Names of all and every other Person or Persons to whom the same doth, may, or shall appertain, in Part or in all, doth make Assurance, and cause                      and them, and every of them, to be insured, lost or not lost, at and from

"Upon any Kind of Goods and Merchandises, and also upon the Body, Tackle, Apparel, Ordnance, Munition, Artillery, Boat, and other Furniture, of and in the good Ship or Vessel called the                      whereof is Master, under God, for this present Voyage, or whomsoever else shall go for Master in the said Ship, or by whatsoever other Name or Names the said Ship, or the Master thereof, is or shall be named or called ; beginning the Adventure upon the said Goods and Merchandises, from the Loading thereof aboard the said Ship, upon the said Ship, &c. and so shall continue and endure, during her abode there, upon the said Ship, &c. And further until the said Ship, with all her Ordnance, Tackle, Apparel, &c., and Goods and Merchandises, whatsoever shall be arrived at                      upon the said Ship, &c., until she hath moored at Anchor Twenty-four Hours in good safety ; and upon the Goods and Merchandises until the same be there discharged and safely landed. And it shall be lawful for the

\* The exact meaning of these initials is not known. They are supposed either to be intended for *Ship* and *Goods*, indicating that the form of policy is adapted to both subjects of insurance ; or to stand for *Salutis Gratiâ*, with which words possibly some older instrument of insurance commenced.

said Ship, &c., in this Voyage, to proceed and sail to, and touch and stay at, any Ports or Places whatsoever

without prejudice to this Insurance. The said Ship, &c., Goods and Merchandises, &c., for so much as concerns the Assured by Agreement between the Assured and Assurers in this policy are, and shall be valued at

“Touching the Adventures and Perils which we the Assurers are contented to bear, and do take upon us in this Voyage; they are, of the Seas, Men of War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Counter-mart, Surprisals, Takings at Sea, Arrests, Restraints, and Detainments of all Kings, Princes, and People, of what Nation, Condition, or Quality soever, Barratry of the Master and Mariners, and of all other Perils, Losses, and Misfortunes that have or shall come to the Hurt, Detriment, or Damage of the said Goods and Merchandises and Ship, &c., or any Part thereof. And in case of any Loss or Misfortune, it shall be lawful to the Assured, their Factors, Servants, and Assigns, to sue, labour, and travel for, in and about the Defence, Safeguard, and Recovery of the said Goods and Merchandises and Ship, &c., or any Part thereof, without prejudice to this Insurance; to the Charges whereof we the Assurers will contribute each one according to the Rate and Quantity of his sum herein Assured. And it is agreed by us the Insurers that this Writing or Policy of Assurance shall be of as much force and effect as the surest writing or Policy of Assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London. And so we the Assurers are contented, and do hereby promise and bind ourselves each one for his own Part, our Heirs, Executors, and Goods, to the Assured, their Executors, Administrators and Assigns, for the true performance of the Premises, confessing ourselves paid the Consideration due unto us for this Assurance, by the Assured

at and after the

Rate of

“IN WITNESS whereof, we the Assurers have subscribed our Names and Sums Assured in

“N.B.—Corn, Fish, Salt, Fruit, Flour, and Seed, are warranted free from Average, unless General or the Ship be



stranded. Sugar, Tobacco, Hemp, Flax, Hides, and Skins, are warranted free from Average under Five Pounds *per Cent.*, and all other Goods, also the Ship and Freight, are warranted free from Average under Three Pounds *per Cent.*, unless General or the Ship is stranded."

#### OF PARTICULAR AVERAGE ON SHIPS.

The policy states that the insurance it grants is on the ~~body~~, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the ship. And then it enumerates the adventures and perils the underwriters \* take upon themselves, or, as it is expressed, "are contented to bear." And the object of the enumeration appears clearly to be, if we consider the greater simplicity of the times which gave this contract birth, to show the fulness of the protection the policy gives; and not by recounting certain risks to imply the negative as to any other marine risks not included, and so to restrict itself entirely to those set forth. Yet in modern times we see the nicest distinctions drawn between the exact risk mentioned and another approaching it very nearly in character; and this in spite of the sweeping generality with which the catalogue concludes, "and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the ship, or any part

\* Insurer is a more comprehensive word than underwriter. The latter means, in common parlance, an individual insurer, such as those in Lloyd's Subscription Room in London. But the terms underwriter and underwriting are so universally known that I frequently adopt the former; always, however, meaning *insurers*, whether companies or individuals.

thereof." The list itself consists of the "perils of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said (goods and merchandises and) ship, &c., or any part thereof."

There is a postscript at the foot of the policy, called the Warranty or Memorandum, and to which attention is specially called by a *Nota Bene*, in which it is stipulated that "the ship is warranted free from Average under three pounds *per cent.* unless General or the ship is stranded."

The above is the basis of the contract made by the underwriters, for the consideration of the premium which they acknowledge to have received in the body of the policy.

#### *Perils of the Seas.*

We have first to consider the perils of the seas, as earliest in order in the policy. These comprise all the accidents of three elements,—water, air, and earth.) All damages caused by the violence of waves, by the force of winds, and by resistance of rocks, sands, &c. are Particular Average; and Particular Average is a risk undertaken by the underwriters. But to this liability there are limitations;—the written one being, that the repairs of such damages must amount to three

per cent. of the ship's declared value; and two limitations established by usance,—the first, that the damages must not be of that ordinary character which scarcely any ship can be free from on any service, and which are denominated *Wear and Tear*; the second, that before the sum of the damages is compared with the value of the ship in the policy, one-third part shall be deducted from the new work on account of *Melioration*,—that is, the improved condition of the ship, by those repairs.

A number of minor but important rules supervene, all of which have to be kept in view when an Average is being adjusted. Several of them will be mentioned as we proceed; and some are so apparently insignificant or occur so unfrequently that it would only encumber the work with minute details to enter into them. It is the Average Adjuster's business, however, to apply every one of them as the occasion arises to which they attach.

The damage that seas can do to a ship is by striking her upperworks, by which bulwarks and stanchions, boats, spars, harness and water casks, ropes and other stores and materials may be carried away or broken; the chain-plate bolts may be broken and the rigging consequently loosened; the sea may carry away or damage the rudder, the capstan, and windlass; it may break or spring masts and yards, and burst sails; it may cause the vessel to roll so as to carry away her topmasts and spars; it may burst hatches, break skylights, and get below into the cabin, destroying thereby perishable stores, charts, books, instru-

ments, and furniture; it may throw the vessel on to her broadside, or, as it is frequently said, on her beam-ends, and threaten her with destruction; it may strain the upperworks and the decks so that water enters the ship's hold and requires her to be freed from it by the use of the pumps; and it may shake the vessel throughout so violently as to wrinkle the metal sheathing and strain her, causing a derangement of the caulking, the springing of butts and the opening of seams, so as to make the vessel leak below; it may by falling on the decks break some of the beams and other substantial parts of the fabric; sweep away the round-house, cooking-house and other erections on deck; wash away the ornamental work from the stem and stern; and it may break the chains or ropes by which the vessel is moored.

About the majority of the above losses and injuries no difficulty will occur. When the vessel arrives at her port of destination, or reaches a port of distress, a survey is held on her to ascertain and specify the damages she can be observed to have sustained, and the vessel is properly repaired and refitted. These repairs form a claim on the policy against the underwriters. What is necessary to be observed is, that the insurers only pay for what has really been rendered needful by accidents. It often happens with ships which are not new, that in repairing the fresh damages a number of old sores and imperfections come to light, and are, very properly, remedied as the work proceeds. But these repairs appertain to the owner and not to the underwriter, and must be

selected and put aside by the Adjuster. His judgment must be exercised in comparing the account he gains from the protest and the verbal explanations of the captain with the surveyor's reports, and the bills of the shipwright and the various tradespeople employed in repairing and replacing damages. Nor must he allow an extravagant or unnecessary expenditure in repairs, or permit any additions to be made to the ship's fabric, as by lengthening her; or any substitution of superior materials for what were taken away, unless in some places where the former are the only materials procurable.

From the repairs which are allowable, both in material and workmanship, one-third is to be deducted for melioration or improvement, except from chains, from which only one-sixth is to be taken, and from anchors, which are allowed without deduction. When the resheathing a ship with metal is permissible a special rule applies, consequent on the gradual and certain wastage of copper and copper alloys on a ship's bottom by oxidation and the galvanic action which takes place. A weight of metal equal to the quantity stripped off is allowed in full; and the new copper or metal for places where the sheathing has actually been torn off and lost, together with the bolts and nails, &c., and the labour of stripping off and working on, are subjected, like other materials, to the deduction of one-third.

Certain expenses, however, are excepted from reduction, though it is not very clear upon what grounds. Such as hire of the shipwright's dock and

ways ; use of shears, stage, and other utensils ; labourers' wages, docking and undocking vessel and clearing away rubbish ; boat-hire ; and a few other small expenses. These are looked upon as accessories, necessary to the effecting of the repairs, but not increasing the value of the materials used. But then the same argument is often used by shipowners against the *thirthing of labour*, which they say is used to put the new material into its place, but is not itself a meliorated portion of the ship, and would have been required even had only second-hand materials been employed in the repairs. There is, logically, perhaps, little or no distinction ; and the true view is, that the repairs should be looked at as a unity, and not be dissected. The new materials would be useless to the ship without the labour, and the labour could not have been employed without certain conveniences ; these three things united form the repairs, and produce the melioration. The cost of documents, the protest, surveys, &c., may, I think, be assumed to stand on a distinct ground, and are properly introduced without deduction, as are the charges incurred before repairs, and evidence necessary to establish the claim on the underwriters.

### *First Voyage.*

If the ship be quite new the full repairs are allowed free from this reduction ;—which is perfectly reasonable. One London company and some insurance clubs consider a vessel new for the first year after she is launched, which appears an equitable rule. The

general test of newness, however, is that she be on her first voyage. This is by no means satisfactory. For with a coasting vessel or collier the first voyage will be one passage from Sunderland to London and back, occupying probably a month, whilst a foreign-going ship may proceed from England to India, China, the Pacific and home, in a continued chain, making up together one long voyage which may expend a year and half in its completion. Under certain circumstances even more time may be included in a first voyage. For if the vessel be one of colonial build, she may proceed from her building port to this country, and even bring a cargo, provided it be shown that the primary object of such cargo was not its profit but to fill the ship and make her fit to perform her passage,—and the journey hither is not to be reckoned her first voyage; and so she may even afterwards go that round of voyages spoken of, occupying a very lengthened period. This causes the privilege of first voyage to act very unevenly; and it would be better that all vessels should be considered new for twelve months after launching; or for certain relative periods dependent on class.

#### *Temporary Repairs.*

There is one kind of repairs which is allowed without deduction of a third; viz., those temporary reparations done in ports where the vessel cannot be restored perfectly and permanently, but which may suffice to allow her to complete her voyage. These repairs, having to be taken away afterwards, are

clearly not to be held in any way to be meliorations, and must be charged in full.

*Of Second Repairs.*

There is considerable difficulty in dealing with repairs or replacement of parts of a ship, whether in her body or the rigging, sails, &c., which are damaged or destroyed a second time. There can be no argument that the second repairs are better than the first, supposing them to be effected at a short interval afterwards; yet it has been thought to be objectionable to break through the rule of *thirthing*, or deduction for "new for old," in exceptional cases. The original guide was the newness of the whole ship, not the recentness of particular repairs. And as it is very probable that old work and new work would be destroyed together, and that it would be very difficult to assign limits to each, and in attempting to separate them a door might be opened to error, it is possible the better plan to leave this unattempted and to deduct one third from the whole. There seems to be a distinction observable in those detached parts of the ship that have a separate individuality, such as sails, parts of the rigging, boats, stores, &c. There is not the same difficulty about a stay, or a mast, or a boat, all having been recently put on board and then carried away or destroyed, as there is respecting integral portions of the ship's fabric; and they may, I consider, be equitably allowed in full without impugning the justice of deducting a third in the repairs just mentioned. This is one of those



delicate points which must be reserved for the discrimination of the Average Adjuster, and it cannot be reduced to any inflexible written rule.

*The Theory of Thirds.*

It may be very naturally asked how the usage became established of deducting a uniform proportion from repairs, considering how very different the condition and the age of individual ships are likely to be; and it may be inquired whether the custom is a good and justifiable one. In answer, it must be admitted at once that the action of this, as of every invariable rule, is unequal;—but then it is useful. It is one of those remedies in which it is better to put up with a little injustice, provided it is well known and understood and is free from the charge of favouritism, than it would be to strive in each particular instance after a more exact measure of justice, and in so doing to open a door to error, misrepresentation, and endless discussion. We are obliged to admit the immense difference existing in the condition of ships, and, consequently, the pressure of the rule. In one case the vessel's general depreciation by age may be seventy-five per cent., and in another ten per cent., or five, or next to nothing. Yet, admitting all this, the convenience of a fixed proportion outweighs the occasional inconsistency of its particular application.

It is more difficult to answer satisfactorily an assertion often made by shipowners, that repairs do not improve a ship at all; that patch-work is not an

advantage; and that they would have preferred their ship as she was before meeting with the damage on account of which she has been repaired. There really is no conclusive answer to this. We may rest a reply on the fact of its being a custom established by the underwriters during many years, and which enters into the estimate of the premiums charged. But then we adopt the same rule for repairs forming General Average, with the several parties to which we have no such compact. And we depart from the rule in claims for cases of collision, where we demand payment *in full* for all the repairs. Nor, on shore, should we ourselves allow the plea. Supposing a gentleman's carriage to be run into by another vehicle, and to be then repaired at the expense of the person doing the mischief, we should certainly resist his deducting a third from the cost of a new panel or from the fresh painting because one side of the carriage is newer and better than the other. The rule of melioration is an arbitrary one, and as such it must remain.

#### OF SOME REPAIRS WHICH ARE NOT CONSIDERED PARTICULAR AVERAGE.

The underwriters have, in general, the onus of repairing and replacing damage caused by the force of the elements. But there are some parts and stores of a ship for which, conventionally, they hold themselves to be not liable, either because they are in a notoriously insecure position—although the customary

one—or, because, the loss of them comes under the denomination of *wear and tear*. Thus, the stern-boat, hanging in davits, is never allowed by them, nor are watercasks on deck, or warps and ropes coiled on deck, except, in the latter instance, if the vessel had just left port or was on the point of entering it, and so required to have the ropes made ready for use. These are excepted on account of the unsafe position in which they were kept. Wear and tear includes the splitting and carrying away of sails by the wind; the breaking and straining of the rigging whilst navigating; the rolling away of small spars; injury to pumps; the carrying away or upsetting of the windlass; the caulking of the ship's bottom when she has not grounded; also the parting of mooring ropes, and of chains and hemp cables by which a vessel is at anchor. It is immaterial, with the exception of a very few extreme instances, how great the violence of the wind and sea may be, sails, chains, ropes, and windlasses are rejected by the underwriters. It may easily be imagined that this custom gives great dissatisfaction to an insured shipowner, and raises much discussion between him and the underwriters. He cannot at once comprehend the principle upon which the above-mentioned articles are excluded by the insurers and thrown back on himself; for he remembers that he has paid premium on them in common with the other parts of the ship, and that no written proviso was introduced in his policy to except them from protection. Indeed it must be owned that the prac-

tice of dealing with the losses just specified does require consideration. It is not affirmed that all such should be admitted indiscriminately by the insurers, as a matter of course;—because it can be proved that these articles are frequently lost or destroyed by ordinary wear and tear, and sometimes in cases where due caution would have prevented their loss. Yet I think there is not *primâ facie* ground for their being invariably disallowed by underwriters, or for their being uniformly classed as “wear and tear,” and left in the adjustment at the cost of the owner.

The rejection of these losses would appear to rest on one of two grounds;—either that underwriters never undertook the risk of the articles lost; or that custom relieves them from responsibility in the event of their loss.

Now as to the first plea:—A sail, a chain, an anchor, a windlass, are as much integral parts of a ship as are bulwarks, spars, copper, paint, &c. An owner makes no proviso with an underwriter that these portions of his vessel shall not be considered to be insured. If he did, he, the owner, would have the right to deduct their value from the general proceeds in a case of wreck and salvage. But he does not and cannot do so. Indeed the above specified articles are of the most vital importance to the ship's safety and to the safety of the lives, the cargo, and the freight which accompany the ship in her destiny. It is not every sail or every cable, however, which ought to be charged to underwriters; for, unfortunately, many ships are ill-found, and continue

to keep in use sails, cables, &c., beyond the period when they are safe, and then the first breeze or plunge carries them away. But, on the other hand, it may be seriously maintained, that there are occasions when no strength of materials can withstand the enormous force of the elements. There are crises when something must give way,—either the windlass, or the chain, or the anchor,—or otherwise the ship must be submerged and founder. Nothing short of miraculous chains and supernatural windlasses would prevent their breaking and giving way in some cases; and if they did hold, there is the other worse alternative, viz.:—the sinking of the ship itself. Something of a similar nature might be said of sails. It is stated that the purpose of sails is to have them set; and if during the use of them the wind carries them away, it is a danger to which they are ordinarily and necessarily exposed; that it is “wear and tear,” and the loss of them is the concern of the owner alone. Now there is something true in such an argument, and there is also something erroneous. The same reasoning might be applied to other materials and parts of a ship, and to the whole of the ship itself. It is the daily duty of the bulwarks to be exposed to the waves, to keep them off the deck:—yet when they are split or knocked away by those waves no objection is ever made to admitting them as part of an Average claim. So it is the ship’s proper service to sail from port to port, and in so sailing to encounter winds and seas and dangers: but if using a thing in its proper service took it out

of the indemnity granted by a policy when it happens to be injured in that service, no claim at all could ever arise, and the whole system of insurance would come to an end.

The other ground is that of custom. The underwriters will urge that the practice has long been submitted to; and that it is competent for persons insuring to introduce any special clauses into their policies, and underwriters would agree to them upon consideration of an additional premium. There appears, indeed, to be a misapprehension as to the power of custom or, as it is called, the usage of Lloyd's, to override the written contract of insurance. Upon this subject, and specially referring to ships' boats, Sir J. Arnould makes the following important remarks:—"It will be observed, that the 'boat' is included by name as part of the ship in the common policies of insurance; hence in a policy on ship in the common form upon the 'body, tackle, apparel, munition, ordnance, *boat* and other furniture,' of the ship, Lord Lyndhurst would not admit evidence of a usage to show that underwriters never paid *for boats slung upon the quarters*, on the ground that, though '*usage may be admissible to explain what is doubtful, it is never admissible to contradict what is plain.*'

"In this case (*Blackett v. Royal Exchange Ass. Co.*) it should be observed that it had been proved on the part of the plaintiffs that such slinging of the boat on the quarters was usual and necessary in voyages of the description insured against: if the contrary were the case, and it could be shown that the boat was

carried in any way which, while exposing it to extraordinary risk, was not proper and necessary on the voyage insured, it might fairly be considered that, as in the case of goods carried on deck, the underwriter would not be liable unless informed by the policy of the nature of the risk. Thus, in a case decided in the United States it seems to have been assumed that, if it could be clearly shown that carrying boats slung at the *stern davits* besides being a *dangerous* was also an *unusual* mode of carrying them on the voyage insured, the underwriter under the common form of policy could not be liable for their loss.\*

We must look for an answer to the arguments in the nature of the thing itself; and we must reason from the congruity of the whole system, looking to the objects of insurance as being to give the subject the fulness and completeness it is capable of. The end and purpose of insurance is to indemnify him who insures against losses incurred by perils of the seas;—and as the losses now spoken of do certainly arise from those perils, whatever secondary code custom may have established, and so the losses are primarily at the responsibility of the insurers, it appears to me that it would be better, on the whole, to be liberal in the way of treating such losses; it would be better for the underwriters to demand such a remunerative premium as will enable them to afford a *complete* insurance, rather than at a smaller price to sell only a partial indemnity. It would be better for the ship-owner, I consider,—because for a small addition in

\* Arnould, p. 218.

premium he will have procured his desired object, viz. freedom from contingent loss and certain anxiety,—he will have obtained a *bond fide* indemnity. It would be better for the underwriters, inasmuch as it brings them an increase of business. For it matters not in trade whether the vendor sell *more* by absolute increase of quantity, or by superiority in quality of what is sold.

Perhaps to adopt some middle course would be best; a course founded on the facts and equity of the case; such as to afford a more perfect indemnity, yet not so as to encourage negligence and bad ownership. There are indeed nice shades of difference constantly arising in practice,—differences in degree as well as in kind, and which require the judgment of a disinterested person to decide them. Thus the Average Adjuster's office is really judicial, and not, as some imagine, one merely of routine. Precedents and rules indeed exist in plenty; but they are not always apposite, and in consequence of an inexhaustible variety of circumstances, they cannot always be pleaded for or against the admission of particular charges in a statement. "The law of cases of necessity is not likely to be well furnished with precise rules: necessity creates the law, it supersedes rules; and whatever is *reasonable* and *just* in such cases, is likewise legal."

#### *Metal Sheathing.*

By one of those tacit rules, which collectively are called the Custom of Lloyd's, underwriters do not



pay for the stripping and resheathing of the bottom unless the vessel have touched the ground or been in contact with some body below the water's edge. Metal sheathing is a material exposed to progressive loss by mere contact with water, and with more rapid waste when the ship is passing quickly through the sea, because by oxidation the surface of the metal is constantly corroded, and is rubbed off by the friction of the water through which the vessel is propelled. Sir Humphry Davy and others have turned their attention to this subject and have endeavoured to devise means to reduce or prevent the wasting of metal sheathing. The great chemist just named tried the protection of iron bolts of particular forms and size below the metal, and a galvanic action was set up, which exerted itself in rings round the protectors, and really had the effect supposed and intended; the wastage was greatly reduced, almost entirely suspended; but another result was occasioned, and which proved more disadvantageous, even, than the gradual loss of the copper;—the surface of the metal being more nearly permanent, all the protected circles became covered with weed, barnacles, and other growths of vegetable and animal life, and the object of the experiments was defeated by its too great success; for the saving of metal took the place of a *clean bottom*. The course of the ship was impeded by the substances which adhered to it; and after several trials of modified means, the experiments were given up. The waste of copper goes on in a ratio not quite uniform, but which may be roughly estimated at twenty-five per cent. in each

year on the quantity of metal remaining. Thus at the end of the fourth year it is generally necessary to re-metal the bottom although the vessel have not met with any accident; the quantity remaining on her will have been reduced to about a quarter or a third of the original weight, and that probably wrinkled and broken by the working of the ship when carrying a cargo at sea. The Yellow Metal, an alloy of copper patented by Mr. Muntz, is less soluble, but it is more brittle. It lasts rather longer, weight for weight, than copper, but in case of accident it is more destructible.

Most ships, too, occasionally strain. It cannot be imagined that the strongest vessel when loaded with hundreds of tons of cargo, and exposed to ordinary weather, now smooth now rough, can altogether escape some degree of strain in her seams and frame. The result is a gradual wrinkling of the metal, and working out the caulking from the seams.

But underwriters hold that ships have no claim on them in regard to repairs of the parts under water unless a definite and acknowledged cause of damage can be shown; that cause means the striking of the vessel on ground, or a wreck, or the collision of the vessel with another so that she receives a blow below water; proofs of which are very obvious to the eye of a practised surveyor. There are two or three other infrequent cases in which they admit they may be liable to replace the metal sheathing. But, again, a grave question arises whether this exception is always justifiable. It is true that by acting on a general

principle of not paying for repairs to the bottom, except as stated, the door is shut to a great deal of fraud and misrepresentation, because unprincipled men are ready enough to take advantage of the underwriters and endeavour to make the expense of keeping their vessels in ordinary repair fall on the insurers; but it is more than doubtful if a real necessity for stripping and remetalling a ship's bottom do not frequently arise although the vessel have received no blow below water. A blow above water may be so violent as to extend downwards and strain the vessel far beneath, if not throughout. A heavily laden ship under canvas, hove down by the force of the wind and sea and kept on her beam ends by water filling the sails, is, until relieved, in an unnatural position,—one that must try her fabric and cause an excessive strain. I believe there are many occasions which create a legitimate claim on the underwriters for damage in this respect. No rule, however good, should be perfectly inflexible, for exceptionable cases are sure to arise. It is proper that the question of the underwriter's liability for resheathing under the circumstances mentioned above should be left to the decision of the marine surveyor and the Average Adjuster.

*Masts, &c.*

Masts carried away or sprung during a gale are Particular Average; so are, by consequence, other spars, yards, booms, bowsprit, &c. If they are pitched away in a cross sea they are generally allowable, although there is not the direct cause of a

storm. Spars which are merely rolled away in ordinary weather do not generally come within a claim; and discrimination must be used to decide how far an unusual force, amounting to what is called an accident, bears out their loss. Studding sail booms, and any small spars which are properly kept on deck for sudden use, are chargeable to underwriters when they are washed off deck.

### *Sails.*

Sails are not allowable when they are blown away or split by the wind. If a sail goes with a yard or mast, or is split when the spar goes, it is claimable. So are, also, sails split or burst by a sea breaking into them; or by the spars of another vessel when in contact. Sails are often lost from carelessness or mismanagement, and are not unfrequently cut away to save trouble, or because the vessel is short-handed. Sails in general are things so much exposed to wear and tear and ordinary accidents that there is much reason why they should be sparingly allowed. Studding sails washed off deck are claimable.

### *Anchors and Chains.*

In collisions it often happens that the anchor hanging over the bows is broken or hooked by the other vessel, and the chain must be cut, if it be not broken by the accident. A vessel lying at anchor may have her chain broken by another ship driving into her hawse, or by pressure when lying in a tier. In these cases the loss is claimable as Particular Average.

*Boats.*

Boats on deck or within board are allowable, but I have mentioned that the stern boat in davits is excluded by custom. A boat lost or damaged in the water is claimable if she be about her duty, and no circumstances make the loss General Average. But a boat is not to be allowed when lost by being carelessly kept towing astern or otherwise left in a place of unsafety when it ought to have been taken on deck. Boats used for loading ships in the West Indies are often insured by a policy apart from the general policy on ship. There may be a claim for General Average for boats doing *extraordinary* service, as in getting a vessel off rocks where she is stranded, &c.

*Stores and Provisions.*

A harness cask properly secured on deck; hen-coops; cow in house on deck; stock of vegetables in the boats; cooks' stores and utensils in the round-house,—are allowable when lost. So, also, stores and bread in the lockers and cabin, when destroyed by the sea breaking on board and forcing its way below. The perishable provisions and groceries are to be replaced without deduction of a third, as they are not supposed to have been deteriorated by keeping. But I have already mentioned that water-casks on deck, unsecured, are classed as wear and tear when they are lost, and are disallowed.

*Ornamental Work.*

Painting will necessarily be required with new work in the topaides, masts, &c., when their replacement

is allowed. The carved figure head; the carving and gilding about the stem and the stern; the ship's name, &c., must be charged to the underwriters. But an extravagant amount of ornamental work is not permissible; for although the quantity stated to have been destroyed may have been so really, yet owners are not wantonly to expose an expensive object in a part where it is so liable to destruction and injury. It stands in the same category as the stern boat. They can place it there if they choose to take the risk of it themselves, in gratification of their own taste for extreme ornamentation, but underwriters must be excused making it good beyond a certain quantity. This limitation is upon the same equitable grounds which prevent a London tradesman recovering more than a certain sum for very valuable plate glass windows to his shop front when they happen to get broken. He may make a reasonable display, but he is not to expose passers-by to the danger of breaking windows of extreme cost:—and windows are necessarily in situations involving at all times some risk as to their safety.\*

\* There is an item of expense which sometimes arises out of a case of Particular Average, and may here be mentioned. A ship having put into a foreign port with damage may there get rid of her cargo, either by its being at its destination or by agreement with the merchants, and, consequently, the joint adventure is at an end. Then, as regards the repairs which have become necessary, it may be found that it is impracticable to effect them at that port; or, that they may be done, but at an exorbitant expense. The master is, under these circumstances, sometimes very well advised by the surveyors or agents to get some temporary repairs effected and proceed home, or perhaps to return as a light ship, without incur-

*Fire.*

When fire breaks out in a ship it most generally ends in her destruction ; the great bulk of a vessel being composed of combustible, and certain parts of very inflammable, materials. When only partial in its damage the injury from burning is Particular Average and subject to the same rules as the preceding. The causes of fire are usually the spontaneous combustion of cargo, lightning, errors of construction in steamers, allowing an accidental overheating of the machinery to ignite the neighbouring woodwork, carelessness and accidents with lights and stoves. But fire being both in ships and in houses insidious in its first steps, it frequently happens that the true cause of the conflagration is never discovered. Of the means taken to extinguish fire the commonest are the pouring water into the hold, and the scuttling of the ship to sink her, if she be in port or in shallow water.

I have already stated that the pouring down water ring the cost of even temporary repairs. How are the crew's wages to be dealt with? It is admitted that great jealousy is allowable when seamen's wages are introduced as a charge to underwriters. An owner is bound to keep his ship manned whilst on a voyage. But here the voyage is ended ; there may be no reason for sailing back to the hailing port, save to get the repairs effected ; and either it was absolutely necessary or greatly desirable on the score of economy, that this course should be taken. I think this is one of those positions that must be judged of by their merits. It should be left to the discretion of a competent person to say whether the wages do not become a real incident of the damages, and, as such, whether they are not sufficiently removed from ordinary owners' expense to make them claimable from the underwriters on the score of invincible necessity or of economy.

into the hold is not allowed to constitute a General Average. Whatever damage the cargo may sustain by that course must be borne by the cargo, and the ship must bear by itself all injury done to it by the spoiling of furniture, stores, provisions, charts, books, instruments, &c. Most of the India policies except by a memorandum all loss by carrying gunpowder as cargo.

I have also mentioned that burning the boats, spars, and stores of the vessel detained in the ice for fuel does not entitle the owners to a General contribution; whilst at the same time the articles destroyed are not claimable as Particular Average, because their destruction was a voluntary act. Thus between the two, the shipowner is obliged to bear the loss under this head himself.

*Men-of-War, Enemies, Pirates, Rovers, Thieves,  
Letters of Mart and Counter-mart, Surprisals,  
Takings at Sea, &c.*

This ample enumeration of risks of a similar kind arising from acknowledged enemies, from licensed depredators, and from predatory rovers, marks a state of things existing when the policy was constructed, which was certainly more than two hundred years ago, from which we may be said at the present day to be almost exempt. Even in the late war\* we have ourselves had so completely the mastery of the sea as that the number of merchant ships taken or destroyed by the enemy is quite insignificant. We now and then, but only rarely, hear of a

\* This was spoken of the hostilities in the Crimea.



vessel attacked by pirates\* in the Levant; the chief scenes of danger from this cause are the Indian ocean—from Dyacks and Malays, and along the coasts of China and Cochin China. Commerce, before the ocean was swept of these public and private pests, was very different from itself in our day: it was fuller of risk and adventure. Indeed, those commercial enterprises which we call *undertakings* were named in former years *adventures*. The charter, for instance, of the Hudson's Bay Company, in the reign of Charles II., is granted to "the *adventurers* trading to Hudson's Bay," &c. And the marine policy itself is expressed thus,—“Touching the adventures and perils which we the assurers are contented to bear,” &c. With regard to letters of mart and counter-mart the wiser spirit of the present age, though it has not power altogether to do without the barbarous and irrational remedy of war, manifests itself in its desire and intention to mitigate the horrors of the system. The nations, therefore, in the beginning of the present contest at once declared that they would keep the scourge in their own hands, and would not allow a political necessity to administer to a mercenary passion, or allow private persons to commit injuries under the pretext of the public quarrel,—dipping their hands in blood for the sake of gain. We may hope that the names of privateers, letters of marque, &c., be-

\* The late Mr. Justice Maule made the remark that the word pirate is not restricted to mean *melodramatic pirates*. There may be piracy in common clothes.

long only to the past, and for all practical purposes are expunged from the modern vocabulary.

As the injuries inflicted by enemies are usually total in their result, this class of dangers will be more properly considered in that part of the subject which relates to total losses. It will be sufficient to say here, that any partial damage done to the ship's hull, sails, and rigging is claimable as Particular Average in the same way as other injuries received at sea; and that the expenditure of powder, shot, &c., seems expressly provided for by the words "ordnance, munition, artillery," &c. specified in the preceding part of the policy.

*Arrests, Restraints, and Detainments.—Barratry.*

So, too, we shall defer the consideration of these two heads, because they eventuate usually in the total loss of the ship to her owner, and the questions which arise in respect of them need not detain us here. If, however, arresting and detaining parties retire from the vessel after having committed some damage to her materials or stores such damage forms a claim on the policy as Particular Average; and the circumstance of its arising from the voluntary acts of man does not set up a material difference to the damage sustained by purely natural causes.

*All other Perils, Losses, and Misfortunes to the Hurt, Detriment, or Damage of the Ship, &c.*

Now, this final undertaking of liability by the underwriters may seem so wide as to include every possible loss, damage, and contingency which can

happen to a ship. And it may seem to exclude any defence which underwriters might make to an action for loss or damage brought against them. The definition of the insurers' liability is, indeed, exceedingly comprehensive ; but we must look to the usual and consistent interpretation which has been made of the terms by courts of law and by writers on the subject of Insurance ; and also, which is of great importance, to that general impression which prevails in the minds of insurers themselves when they sign a policy ; because *intention*, though not on every occasion openly expressed, is to be looked to in construing contracts which are for the most part couched in the unvarying terms of a printed form.

It may, then, be unhesitatingly asserted that underwriters by their policy have no intention of granting such a plenary indemnity as it would amount to if they undertook to restore every ship at the end of the voyage insured to the same condition in every respect in which she was when she sailed. For then they would virtually have to repair the ordinary ravages of time, and restore the vessel to a perpetual youth. They would have to cure the inherent defects (*vices propres*) which might have existed in the ship and which from some cause exhibited themselves during the currency of the policy. *Now they do not mean to undertake this. The foundation of claims on underwriters is ACCIDENT.* The damage which the vessel sustains must be something extra to the ordinary events, to the ordinary waste and decay which all shipping is subject to. If a ship lies in a tropical

sun the seams will shrink, and her paint will blister ; if she lingers about the mouth of certain rivers worms will attack every exposed piece of wood within their reach. However, in a late case, a leak caused by worms attacking a ship was held to be one of the perils of the sea within the exceptions in a bill of lading, the vessel having been sea-worthy when she sailed.\* But it has been commonly maintained that damage by worms is only chargeable to underwriters when the timbers, &c., previously covered with metal have been denuded by accident. If a ship's boat be allowed to remain floating by her side when the occasion for its use has ceased it may be stolen or swamped ; if a vessel go on winter voyages, she will necessarily expose herself to winds and waves which will strain her, rend her sails and wear her rigging. At all times and places a slow process of destruction is going on which will at last, as a matter of certainty, cause her death. A ship is a terminable property ; and this fact enters into the consideration of a price given for her, and of the rate of freight demanded as her hire. Underwriters do not intend to take upon themselves the repair of that gradual decay which is *incidental* to a ship's condition, but only of those unusual and non-necessary deteriorations which are *accidental* to it. So that if even a vessel be in a certain trade in which it is known that all vessels that are hardy enough to enter upon it are exposed to risks, as a matter of common occurrence, which do not commonly appertain to other voyages

\* Heydorn v. Bibby. *Exchequer*, March, 1855.

and trades, the injuries they sustain do not necessarily form claims on the insurances ; because, *quoad* that trade, the injuries are expected and frequent, and a certain number of them are calculated upon and are compensated by the increased freight paid in that particular trade. Thus at St. Michael's it is nearly an every-day occurrence for the ships lying there to have to slip their chains and proceed to sea : when the weather again becomes favourable, they return and pick up the anchors left there. And I shall have presently to show that in certain ports and rivers it is common for vessels to ground with the ebb tides, or on certain known bars of sand, and yet these same groundings do not constitute a *stranding* within the meaning of the policy, although a much shorter detention on the ground in some other place would have all the character of a stranding. These distinctions are not caprices or inconsistencies ; they proceed from a great ruling principle, which ought always to be kept in mind, viz. ;—*that underwriters are responsible for the extraordinary, and not the ordinary events of a voyage.* What has been said will give a meaning to the expressions *perils, losses, and misfortunes*, used in the policy. At the same time I may repeat that the terms are very large and general ; that they do hold out a prospect of a liberal compensation to the owner who is insured ; and that the assured who has met with damage ought not be put off with technical quibbles, or set aside upon some verbal informality. He pays his premium in good faith, expecting an equal measure of good faith

on the part of his underwriters. And the latter persons are supposed to know their business and to demand for each separate risk a premium which, taking all the circumstances into consideration, is calculated to remunerate them for the hazard they run.

#### OF STRANDING.

Passing downwards from the body of the policy to the note at its foot called the Warranty or Memorandum, we come to a very important stipulation with respect to claims, and one which has been the occasion of almost innumerable questions and suits. It is so necessary to entertain a clear understanding on this part of the contract that we shall enter at some length into its examination. The clause, as far as it concerns the vessel, runs thus.—“The ship . . . warranted free from Average under three pounds per cent., unless General or the ship is stranded.”

#### *Intention of the Clause.*

The intention of this restricting warranty is pretty obvious. It is to protect the underwriters against trifling and frivolous claims. Had it not been introduced into the policy the most vexatious demands might be made upon the insurers. Not a ship that came into port at the completion of her voyage but might find some petty repair to effect at the underwriters' cost. The latter would need the eyes of Argus to defend themselves from imposition; and no vigilance would suffice if claims were allowed to be unlimited as to extent. In order therefore to avoid

constant petty demands upon them for equivocal damage, and to confine their liability to *bonâ fide* claims, a line was drawn and an arbitrary proportion was established, the tendency of which would be to dismiss claims and attempts at claims by relieving underwriters from them if the repairs of damage fell below the limit of the three per cent. on the declared value of the ship in the policy. It was not intended, however, to apply to General Average Contribution, for that was not open to the same objection; a claim on this account was more likely to be genuine; and by not limiting the proportion to a definite ratio, no inducement was held out to any party concerned to run up expenses where they could be avoided.

*Why an Exception made in favour of Stranding.*

But another exceptional proviso is made in the warranty, viz., in favour of a ship that is stranded. In this case no inquiry need be made into the proportion which the repairs bear to the value of the ship. No doubt, when first the term "stranded" was used it had a much stronger and more defined meaning than is now assigned to it by law and by custom. I think it scarcely admits of a question that when the word was originally employed in the policy it was to indicate a cause of damage so great and notorious as to set aside all doubts about the propriety of a claim on the insurers. By "stranding" was intended the casting of a ship on shore, or the lying of a ship on rocks in such a manner as that great and immediate injury would accrue to her, if not total destruc-

tion. But afterwards it was found that there were many sorts of lying on the ground which might be entitled to be called strandings, and yet might not inflict any great or special injury on the ship or goods. When a great number of cases more or less approximating in circumstance came to be compared this practical difficulty was discovered,—that often there might be a stranding in form, and yet the ship and goods might not receive much damage; and again, there might be great injuries done to a vessel and her cargo by striking with her bottom on rocks or some other substance, and yet not in such a way as to comply with the idea and definition of a stranding. Were the former, the slight damages, to be admitted in virtue of an almost nominal stranding? Were the latter, the real injuries, to be excluded, because some circumstances were wanting to bring them within the conventional meaning of the term? And then as maritime commerce, and especially the coasting trade, continually increased, a host of difficult cases arose, and refined definitions were resorted to to show that they came within the favoured term of “stranded,” or that they should be excluded from the benefit of that privileged expression. I think it may be considered that the principle is firmly established that if the formal conditions be fulfilled the results need not be looked to:—that if it can only be shown that a ship is stranded within the definitions as successively laid down in our courts of law, it matters not that, effectively, little real damage was consequent upon the stranding, the damage is claimable on the



policy:—and conversely, that however great the damage, and however clearly it may be traced to a concussion received by the bottom of the ship on rocks or ground, yet if it does not exactly meet the prescribed conditions of a stranding it is not claimable as on that score. So that whilst a claim may be established for a slight injury to a ship by her getting across a brick sewer in the river, as being a stranding, another claim for injuries of a severe kind must be rejected, though it can be shown to have been occasioned by the vessel striking during an hour or longer on pointed rocks, provided that all the time she were water-borne and not absolutely at rest upon the bottom.

*The Effect of a Stranding is to destroy the Warranty.*

Now it is of great importance to observe that a stranding when established destroys the Warranty. This is doing far more than merely admitting the particular damage occasioned by the stranding itself; for it lets in all former damages on that particular voyage, though they happen quite independently of the stranding. It, in fact, expunges the limitation of the claims to a given ratio. It wipes out, as it were, the "Memorandum."\* This is of great consequence in claims on goods; but as I shall have to return to

\* Thus the Warranty is very similar to a *condition* in law: one infraction of which destroys it for ever, without power of revival. The legal *condition* has been ingeniously compared to the little scientific toy, the Rupert's Drop. Break off the smallest fragment of the glass thread in which the drop terminates, and all cohesion

the subject of stranding when treating of that part of the subject, I need not enter farther upon it here.

*The Conditions necessary to a Stranding.*

It is not every resting on the ground that constitutes a strand: far less is it every violent striking on ground, though productive of much mischief, that establishes it. Judges have defined and redefined, have identified what is common, and nicely distinguished differences. The more decisions that were given the more intricate the subject became; and uncertainty seemed to prevail in proportion to the number of the rulings of courts and the verdicts of juries. The primitive idea has long since been abandoned; and having wandered from it so far as to render return next to impossible, the only course which remained was to collect cases for and against stranding, and to gather into one the conditions which are at present held to be essential to its nature.

They are the following:—

First; the course of a ship must be stopped for a *definite portion of time*.

Secondly; the ship must be stopped or her situation altered by some *accidental* occurrence; the grounding or stoppage must be unusual.

Thirdly; she must be *out of her course*; or she must be in a situation she ought not to be in by the ordinary circumstances of the voyage, &c.

Fourthly; when stopped she must *not be at all* is gone,—it flies into ten thousand atoms in the hand. The same figure would equally apply to the warranty, the infraction of which has, moreover, a retrospective effect.

*water-borne*, she must be actually at rest on the bottom, whatever it may be.

These appear to be the important features of an established strand. They do not seem to convey the same impression which we receive *à priori* from the term stranding. That word originally meant to express "great damage received by a ship in consequence of striking or lying on a shore, rocks, and the like." These definitions imply something weaker than this. We hear little or nothing of violence. We seem to look to a compliance with certain forms, only.

First. The course of the ship must be stopped a definite portion of time. But it is not of consequence that it should be a long time, so that it be definite,—absolutely a stoppage *pro tempore*. A quarter of an hour is sufficient, nay a minute will suffice, if it can be shown that the progress of the ship was stayed by some obstacle on which she rested. Neither is it of consequence on what particular substance she rests. It may be rocks, or stones, or sands, the shore of a sea or the bank of a river: it may be mud, or a sunken wreck (if it be stationary, fixed to the ground), or a pile, or, as I mentioned before, the brick arch of a sewer projecting into a river. Formerly it was thought that it was necessary, to prove a stranding, that anchors and chains should have been carried out to heave the vessel off with. This may be a good corroborating circumstance, but it is not an essential one.

Secondly. Accident is so essential to the nature of a stranding that it may be said to be its univocal sign. Where vessels rest on the bottom in a usual

way, strain, make water, &c., this is not stranding within the meaning of the policy. There are many tidal harbours where at particular periods of the tide all the vessels ground. There are rivers, like the Hooghly, so studded with sand-banks that in ordinary navigation the vessels commonly stop on them, and their remaining on them for a while is so common an occurrence that it has nothing accidental in its character. There are other rivers, like the Danube, that have sand-bars across their mouths, where it is certain that all ships of a given draught of water will ground, and that vessels of a less draught *may* ground at periodical or uncertain times when there is less water in the river than usual. At the Sulina mouth of the Danube the majority of vessels discharge part of their cargoes into lighters, to reduce their draught sufficiently to enable them to pass the bar. Such groundings as the above-named are not strandings, because accident is not an element in them. But let accident interpose, and a stranding may take place in the very same spots. In going up a river a sudden flaw of wind or a blow received from another vessel may make a ship lose her headway, and she may ground on the river's side and be stranded. A ship may be in a river harbour, lying on the ground in safety, but a fresh of water coming down, or the action of a storm, causing the sand under her bottom to scour away and leaving her unsupported in part of her length, may strain and injure the vessel, and she will be held to be stranded.

In the trial of *Thompson v. Whitmore*, a vessel

under charge of a pilot, in her course up the river to Liverpool, was, against the advice of the master, fastened at the pier of the dock basin by a rope to the shore; she was left there, and took the ground. When the tide left her she fell over. This was held to be a stranding. Here was an accidental interposition, which is essential; but, it was remarked, it is not essential to constitute a stranding that it be the consequence of a storm.

So, again, in *Rayner v. Goodmond*, a vessel arrived at a place called Beal Lock; and while there, it became necessary to draw off the water. The master placed her in the most secure place he could find, alongside four other vessels. On the water being drawn off, all of them grounded; but this ship grounded on some piles which were not known to be there, the part of the navigation where she took the ground being the usual one where vessels were placed when the water was drawn off. It was held to be a stranding.

So in another case, *Bishop v. Pentland*, a vessel in the ordinary course of her voyage was compelled to put into a tide-harbour, and it became necessary, in addition to her usual moorings, to fasten her by tackles to the shore, to prevent her falling over. The rope not having sufficient strength, broke when the tide left the vessel, and she fell over. This was also held to be a stranding.

The same was ruled by Lord Tenterden where a ship arrived in Hull harbour and proceeded to discharge her cargo at a quay. As this could be done at

high water only it could not be completed in one tide. At the first low tide the vessel grounded on the mud. On a subsequent ebb, the rope, by which her head was moored to the opposite side of the harbour, stretched, and the wind blowing from the east at the time, she did not ground entirely in the mud, but her fore part got on a bank of stones, rubbish, and sand near the quay and the vessel strained.

The cases cited will show the animus of decisions for and against stranding, as involving the underwriter's liability. For in these instances it was clear that damage occurred to the property insured, and that the damage was closely connected with the circumstances detailed in each. In many cases where stranding affects claims on goods, and also sometimes on ships, it is very doubtful how much of the damage, or whether any of it at all, was occasioned by the grounding which it is desired by the assured to prove to be a stranding. But here it is different. Here there is no doubt that the assured's property was endangered, and the technical question is only whether the circumstances through which the damage accrued came under the definition of strandings. I shall hereafter show that such questions are much more important where goods are concerned than where the ship alone is affected; because with regard to the former we shall see that many descriptions of merchandise are free from Particular Average *unless stranded*, but ships are rarely so warranted; and that other descriptions of goods are declared free from Average unless the damage amount to a given pro-

portion of their value, as ten or five per cent. ; whilst a ship is only limited to exceed three per cent. ; upon which latter limitation or franchise a particular argument will arise.

Thirdly. A ship must be out of her course, or she must be in a situation she ought not to be in by the ordinary course of the voyage. This postulate may be almost considered to be involved in the two signs of stranding already given. But I prefer to retain it separately because of a very decided, and, I think, memorable and important sentence spoken by a judge (Littledale) upon this particular feature. He said, "I think it is immaterial whether a vessel takes the ground when she is in the course of, or at the end of the voyage. But when the vessel is on the ground, or stranded, in such a situation as she ought not to be in while prosecuting the voyage on which she is bound, that is stranding within the meaning of the policy." And this gives a clue to decide some very difficult questions of stranding ; cases in which the circumstances very closely resemble one another, but having this point for a difference. Thus, a vessel proceeding towards or from a harbour up an estuary or a river in which are many shoals of sand, like some of the ports on the Norfolk coast, may ground once or several times in the course of her journey, and yet, as I have before stated, not be *stranded*, because such groundings are incidental to that particular navigation : but if by reason of some previous accident the vessel be unmanageable ; or being well under command if she lose her way in a fog ; be set out of her course by a

current; or be driven out of her proper and usual channel by a storm or a squall, a grounding then under such circumstances would be a stranding, even though no more damage was received by the ship than what happened when she grounded in the manner previously described. And so in the case I allude to of a ship which by some accident got across the brick arch of the common-sewer running into the river Thames near the entrance of the London Dock, and on which she broke her back; this was a true stranding: because all these cases can be proved by the test of Judge Littledale, that the vessels were in such a situation as they ought not to be whilst prosecuting their respective voyages.

In one of the latest cases tried relating to stranding, a vessel in distress put into a harbour of refuge and, it being low water at the time, grounded on the mud. This was held to be a stranding, the ship's course having been departed from through necessity. Had she entered at high water and the tide afterwards gone down, leaving her on the mud, that would not have been a stranding.\*

And this indifferency as to what part of a voyage the ship is on when she meets with the accidents was well shown in a case that came under our notice, where a ship waiting in a French harbour to receive her cargo was ordered by the authorities to remove from where she was moored and go across the harbour and lie on the mud on the other side,—a usual place for ships to lie whilst waiting. She

\* *Concoran v. Gurney, Queen's Bench, Jan. 1853.*



went, was placed on the mud, and as she gradually settled down in it a pile or post that was not visible entered her bottom, and so transfixed her as to require her to be lifted upwards to withdraw her from the post which had pinned her there. And if a ship at the end of her voyage on entering her harbour and coming to her berth settles upon a large stone which enters her bottom, there is a strong presumption that this would be a stranding; because the vessel is in a situation she ought not to be; for it cannot be a right situation for a ship to be sitting on a sharp stone.

Fourthly, and lastly. The vessel, to be stranded, must cease to be water-borne. She must be hard and fast aground. A ship may drive over a ledge or reef of rocks, or a bank of sand, thumping and striking as she goes with every sea, and do herself the most serious injury; she may knock off her keel, rip off the metal sheathing, carry away her rudder, &c., and spring a violent leak, and not be able to set up any claim for stranding. Still less, then, will a single shock, however violent, on an isolated rock or on any fixed or floating substance, such as a wreck, avail to set up a stranding. It frequently requires all the acuteness of the Adjuster to distinguish between cases that may so nearly approximate. And it requires an equal exactitude in the master, officers and other persons present when the accident takes place, to observe, and note in the logbook the particulars of it; since the result, in principle, may turn on a minute circumstance. For example, a vessel driving with her anchors down on to a lee shore arrives at a point where she sticks or feels

her bottom with the recoil of every sea ; nay, so nearly may she be to a state of resting on it that it can only be distinguished by the closest attention whether she is upheld by the water or not. And yet, in essence, the question depends upon the fact of her being or not being so upborne.

In fine, the difficulties respecting stranding arise principally from the circumstance of the grounds of decision being of so purely technical a character. But, I admit, questions of stranding would be even more debateable if some rules were not adopted, however difficult they become in application.

#### WHETHER THERE IS ANY REASON FOR THE STRANDING EXCEPTION TO THE WARRANTY IN CASE OF SHIPS.

It has been intimated that an arbitrary line was drawn to prevent frivolous and trifling claims on ship policies by making it necessary that the net amount should exceed 3 per cent. of the declared value of the ship in the policy ; but that this did not apply to those charges called General Average, which are excepted from the warranty and are claimable irrespective of amount. It would indeed be absurd and very inexpedient to refuse to pay charges because they are small in amount, for the very object of the charges is remedial and in order to prevent loss, or to keep that loss as small as possible. The object of excluding damages to ship under 3 per cent. was to shut out trifling and vexatious claims, for hardly ever a ship arrives off a

voyage without the necessity for some little expense ; and without this limit in the warranty the owner might always run to the underwriter for payment of every paltry repair. The rule, however, wholesome as it is generally, is relaxed in case of the stranding of the ship ; and we are going to inquire whether there is any valid ground for this exception, and whether there is any advantage in retaining it. Now stranding itself was privileged inasmuch as it was a clear and notorious cause of damage ;—that is, stranding in its original and primitive meaning. But refinements were made and so many slight cases claimed to be admitted as strandings, that at last the amount of damage done became not to be an essential feature in the question ; and sometimes all the benefits of a stranding are given in cases where there is a moral certainty that little or no damage was received by that specific accident : so much so, that often claims are made for repairs of damages by stranding which do not amount to 3 per cent. of the value. But if by resting or striking on the ground or rocks a vessel receive no more damage than can be repaired for a sum under 3 per cent. of her value, it is clear that the damage is not of that violent character which the idea of *stranding* suggests to the mind. In fact, the cause of damage is no greater then than in other of the frequent accidents which a vessel meets with in her navigation from boisterous weather, during which she splits her sails, carries away her bulwarks, &c. ; but which damages can all be repaired at something under 3 per cent. of her value, and are consequently not recoverable on the

policy. Nay, the ordinary wear and tear of a ship during a voyage to her painted work, her running rigging and small stores, would require a sum to reinstate her in the same condition as when she set out, little short of 2 out of the 3 per cent. required. There is, then, no reason why that small amount of damage (less than 3 per cent.) should be admitted because a vessel has been technically stranded, since it is clear that such a stranding has caused her no more injury than she might have met with from the ordinary events of a voyage, the occasional bad weather she usually encounters, and the wear and tear which necessarily attend her navigation. On the other hand it is very plain that if a vessel meet with serious injuries, I mean such as exceed 3 per cent. of her value, the exception to the warranty is needless, because a claim for repairs stands good without its assistance. In the case of goods there is a difference and this argument does not apply; for there is no presumption in the ordinary course of things that they will be landed in any but a sound condition.

#### OF COLLISION.

Though not recited by name in the body of the policy, damage by collision is a frequent source of claim on underwriters. It is one of the many casualties included in "all other perils, losses, and misfortunes" that may come to the hurt of the ship. Collisions appear to be more frequent now than they were formerly; and a very large proportion of col-

lisions are cases in which one of the colliding vessels is a steamer. As would be expected, these accidents are nearly always near coasts or in channels where there is much traffic. There are sometimes occurrences of this kind between two ships far away from land, on the high seas ; but the chances of two vessels meeting on the same line where there is the space of a whole ocean for each to move in are so few, that when a calamity of this nature takes place under such circumstances the strangeness of the coincidence seems to add a supernumerary horror to the event.

It appears by the Admiralty Register of Wrecks, that in the year 1854, 53 vessels were totally lost in collision, and 41 vessels were seriously damaged from the same cause on the coasts and in the seas of the United Kingdom. Two hundred and ten lives were lost in two vessels alone which foundered at sea in collision. We must add to the 94 cases above, collected in the Registrar's return for that year, a very large number more for vessels which received damage by collision, but not of such serious character as to entitle them to a place in a list which professes to be a Register of Wrecks. But I think we may safely say that the number of damaged ships would give a proportion of more than one ship injured by collision in every two days of the year upon or near the coasts of Great Britain.

In the year 1855 there is a singular coincidence in the number of vessels totally lost in collision, the cases being 55, but there is a great increase in the whole number of collisions during that year, for they

amounted to 178 vessels seriously and 14 vessels slightly damaged by being in contact with other ships. Happily, the amount of loss of life was materially less than in previous years. The remark is made in the Register, that these frequent collisions unquestionably arise in a great measure from the hampering of the vessels' upper decks with cabins and other constructions which shut out from the view of the helmsman the object ahead of his ship.\*

From the combination of two ships A and B in collision, four things may happen, viz.—

The contact may be purely accidental; neither A nor B may be in fault.

A may be in fault, and B innocent.

B may be in fault, and A innocent.

Both may be in fault.

In the first and fourth cases each ship will bear its own expenses; or, in the last case, each ship may be adjudged to bear a moiety of the joint expenses.

In the second and third cases the ship in fault will pay the expenses of both vessels.

Now let us see how underwriters are affected by these different states of things.

I have said that damage through collision is claimable on the policy as one of the "other perils," &c. insured against. Supposing it to be a case of pure accident, no blame being attributable to the other vessel, the loss will be settled as a Particular Average,

\* In 1857 the number lost by collision was 53, and the number of vessels seriously damaged from the same cause, 224. In 1858 50 vessels were totally lost in this manner.

similarly to any other damage received. And in any case, the first remedy of the owner is against his underwriters if he chooses to take it, and he may afterwards at the request and on the behalf of the insurers take proceedings against the vessel by which his own was injured. What he recovers is for the benefit of his underwriters. But if they have paid his claim deducting the usual third from repairs, and he afterwards recovers from the other ship his repairs in full, it is not usual to return more to the insurers than suffices to wipe off the sum they settled and any law-expenses afterwards incurred, and he will be allowed to retain the rest on his own account. As in nearly all these cases a settlement by the other vessel is preferable to a settlement by underwriters, for among other advantages the thirds are saved, an owner very often elects to take his remedy in the first instance against the colliding ship. But though he intend to claim from his underwriters, he may take all steps against the ship doing damage which are necessary to recover from her without injuring his right on his policy. And if he appear as plaintiff in an action against the other ship, having his underwriters' approval or authority, his right of recovery from the latter is not defeated. This is provided for by the policy itself, which declares, "and in case of any Loss or Misfortune, it shall be lawful to the Assured, their Factors, Servants and Assigns, to sue, labour, and travail for, in and about the Defence, Safeguard, and Recovery of the said Goods and Merchandises and Ship, &c., or any Part thereof, without prejudice

to this Insurance; to the charges whereof we the Assurers will contribute," &c. However, before taking legal proceedings in a collision case, it is advisable to first obtain the sanction of the underwriters.

*Mutual Obligations.*

And I may here remark generally, that some moral obligations subsist between parties standing to one another in such a relation as assurers and assured do; obligations which bind each to do what is in his power to protect the interest of the other as against third persons. It is sometimes selfishly said by the insured, "I shall recover on my policy; it is not my business to look after the underwriters' interests; they can do that themselves." But there are many things which a master or owner from his position can know and do, which the underwriter is ignorant or incapable of; and therefore it is the incumbent duty of the former to ascertain and to act so that the insurers may not be put to an unnecessary loss. And, on the other hand, the insurer is not to take advantage of the steps which a master or owner makes for his benefit; and endeavour to escape from liability on the policy. There is often, unfortunately, a feeling of antagonism between the assured and the insurer as if their interests were diametrically opposed, instead of their being in many respects coincident.

The remedy in collision cases is against the thing itself. The ship doing the damage may be arrested, and proceedings can be taken against her in the Admiralty Court. Should she be condemned to pay



the damages, she will be sold, and her proceeds applied to satisfy the claimants. Should the cargo of the injured vessel be damaged also, and join in the suit, it will take its share of the proceeds. But supposing the proprietor or proprietors of cargo hold back until the suit brought by the ship is decided, they will not be allowed to participate in the proceeds, but only take what surplus may remain after the satisfaction of the ship's claim.

It is nearly always a difficult matter to decide who is in the right in a collision case. The evidence on both sides is *ex parte* and contradictory. The safest plan at sea to avoid collision and to facilitate recoveries when necessary, is to adhere as closely as possible to the Admiralty directions as to course, showing lights, &c. And here again the insurers have a right to expect that the captain will act prudently and properly, and will not place the property under his charge in jeopardy by foolhardy or irregular acts.\*

*Where the Ship insured is in fault. The running-down Clause.*

If the ship insured be in fault in a collision case, her own damages are recoverable on the policy, but not those of the other vessel. To gain protection against the risk of having to make good the injury

\* Nevertheless something is left to the judgment of the master. "Even a blind adherence to these rules will not absolve a vessel from blame, if, by persisting in her course, a collision is occasioned which she might have avoided." *The Commerce*, 3 W. Rob., 287; *The James Watt*, 2 W. Rob., 270. *Digby Seymour's Supplementary Notes to Merchant Shipping Acts.*

done to the other vessel a clause is very commonly inserted in the policy, by which underwriters agree that in case the ship insured shall run down and damage any other vessel and her cargo, and be found liable for such damage by any court of law or equity, or by any competent tribunal, they, the underwriters, will pay a certain portion of those expenses, (very frequently three-fourths,) in such proportion as the sum insured bears to the whole value of the ship and her gross freight. This is known as the Running-down Clause.

*How Claims are made against other Vessels.*

In making a claim against the vessel doing damage those regulations we have previously spoken of, of deducting one-third of the repairs to equalise new with old, are not observed. On the contrary, a claim of the fullest kind, including every expense and loss, is made, embracing crew's wages, loss of interest, detention, &c., and the cargo can put in a claim of a similar character.

*Several Interests.*

Should there be several interests that have received damage, and they do not unite in a joint action against the ship doing damage, after the first interest has been satisfied by payment and the vessel has been liberated, it is competent for another to proceed against the same ship and recover. And there does not appear to be any limitation to the number of consecutive payments that may thus be enforced in respect of the same ship and freight by which the damages were done.

## PART THE THIRD.

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### OF PARTICULAR AVERAGE ON GOODS.

Claims for loss on merchandise insured by perils of the sea, &c., are technically distinguished as follows :—

1. Total loss of the whole interest.
2. Total loss of part of the interest. (Sometimes called a Partial Loss, and sometimes, Particular Average.)
3. Partial loss ; by a sale at some intermediate place. (Called also a Salvage Loss ; or a Total Loss with Salvage.)
4. Particular Average.

Concerning the first of these divisions it will be convenient to withhold any remarks on the subject until we come to consider the whole matter of Total Loss in one view.

The second,—Total loss of part may consist of the absolute loss of one or more packages of goods ; as by an accident at the loading or unloading of cargo, upsetting of a boat, and the like. Or, it may consist of the complete washing out of some packages by the sea-water that has entered the ship ; or the rotting

and entire worthlessness of a portion of the cargo from the same cause. These are rather of the nature of Particular Average, and are often classed with it in adjustments.

The third,—Partial Loss, Loss with Salvage, or Salvage Loss, consists in the sale of goods damaged by sea perils at some intermediate place where the ship has put in and the goods in question are sold at the recommendation of surveyors.

The fourth,—Particular Average, properly so called, consists of the depreciation of goods owing to sea perils, and ascertained at their place of destination. The depreciation arises from the deterioration of the quality of the goods, or from a reduction in quantity, or from both combined. Particular Average adjustments embrace two subjects, viz.,

The deterioration of the goods by sea-water ; and  
Extra charges, in consequence of the goods being sea-damaged.

Before entering upon a more detailed examination of the various claims on goods it will be necessary to refer again to the policy and observe those clauses and expressions which apply especially to merchandise.

#### *Subject-Matter and Scope of the Insurance.*

The policy states the general intention of the insurance to be “upon any Kind of Goods and Merchandise ;” and its period of endurance to be as follows ;—“beginning the Adventure upon the said Goods and Merchandises, from the Loading thereof aboard the said Ship, \* \* \* and so shall con-

tinues and endure \* \* \* \* until the said Ship \* \* \* and Goods and Merchandises, whatsoever, shall be arrived at,"—(here the destination of the interest is inserted;) "and upon the Goods and Merchandises, until the same be there discharged and safely landed."\*

*The Risks insured against.*

The statement of perils, &c., covered by the policy is the same on goods as on the ship; there being nothing special to or exclusive of merchandises in all that portion of the policy which is printed in large roman type.

*The Warranty or Memorandum.*

But the Warranty contains special matter relating to goods, of very great importance; for it excludes some species of merchandise from restitution in case of damage, and it fixes the limit of deterioration which must be reached in other species in order to constitute a claim on the underwriter, viz.: "Corn,

\* In *Harrison v. Ellis* (*Queen's Bench, April, 1857*), an attempt was made to throw on a time policy on goods the risk of cargo in a warehouse on shore. The insurance was one upon a fluctuating interest, viz., on goods in the bartering trade of Africa, intended to protect a certain amount of value whether the interest happened to be outward goods, produce home, or intermediate goods whilst bartering. There was oil in a factory on shore, from which factory the homeward cargo would have been shipped; but it never left the warehouse, which was burnt before any of the oil was sent on board. Lord Chief Justice Campbell and the other judges in delivering their judgment are conclusive that goods in a warehouse on shore, whatever their destination may be, are not, in ordinary circumstances and without a very special clause to the effect, interest attaching to a marine risk.

Fish, Salt, Fruit, Flour and Seed, are warranted free from Average, unless general or the Ship be stranded; Sugar, Tobacco, Hemp, Flax, Hides, and Skins, are warranted free from Average under Five Pounds per Cent.; and all other Goods are warranted free from Average under Three Pounds per Cent.; unless general or the Ship is stranded."

Thus, then, the policy gives security to the goods from the moment they are loaded on board the ship. And there is generally a further clause added in writing to this effect, "Including risk of Craft and Boats to and from the Ship." So that protection under the policy commences from the minute the goods leave *terra firma* to be taken to the ship, when it is necessary to cross water to do so, and that protection ceases simultaneously with their safe arrival on shore at their destination. The written clause of craft risk *from* the ship appears, indeed, superfluous here, since the wording of the policy itself continues the underwriters' liability until the goods are safely landed.

The warranty now, as in the case of the ship, interposes to protect the underwriter from insignificant, frivolous and vexatious claims. But as affecting merchandise it has other important objects. There are certain kinds of goods which are more susceptible of injury than others; and there are some which contain, as it were, the causes of deterioration or destruction within themselves, so that the very smallest access of sea-water to them is able to set on foot an action which may afterwards go on and

damage or waste them to a great extent. Nay, ordinary causes, such as humidity of atmosphere, the heat of the ship's hold, or the dampness that commonly is found in a ship, will produce deterioration, decomposition or germination without waiting for more definite accidents. And then the difficulty of attributing damages of this kind to their authentic source, and the still greater difficulty of distinguishing between damage where two causes have been at work has made it expedient, both in order to avoid disputes and to obtain a moderate scale of premiums, that either such goods should be excluded altogether from Average claims or that a higher limitation should be put upon them. But again, as with ships, a stranding destroys the warranty and lets in a claim against underwriters be it large or small. It is useless to discuss farther either the reason or the usefulness of this regulation, but it is invariable.

As one advantage of this limited liability with regard to claims for Particular Average is to prevent the necessity of excessive premiums, it stands as a general condition: but in cases where it is desired to obtain a larger indemnity a special agreement can be entered into with the underwriters, making fresh terms as to the payment of Average in consideration of giving them an extra premium for that additional risk. This agreement being made in writing will override the usual printed warranty.

In some foreign policies the warranty has a rather different signification. It not only requires that the damage should amount to a certain proportion of

the value of the goods insured, but it gives to the assured, in case of Average, only that portion of the loss which *exceeds* the agreed limit, which is there called the *franchise* or *affranchisement*. We shall see hereafter that this arrangement is adhered to in English policies in the case of one particular kind of goods.

*Distinction between Partial Loss and Particular Average.*

A Partial Loss and a Particular Average are distinguished in this respect,—that the former is a loss arising on damaged goods which are sold at some place short of their destination; and the latter is the loss arising when damaged goods are sold at the proper termination of the voyage. In both cases the original cause of damage must be a peril of the sea, which includes fire and some other things.

There is this further difference between the two;—that in a Partial Loss, the claim, when the goods are in packages, is paid although it do not amount to the 3 or 5 per cent., or other limit as warranted; whilst it is essential that a Particular Average should reach the limit in the warranty. The two species of loss are considered strictly as different in nature, and they are not allowed to influence one another. Thus, suppose a Partial Loss on goods be settled on a policy to the extent of  $1\frac{1}{2}$  per cent. of their value; and that afterwards a Particular Average be made up which would amount to  $1\frac{1}{2}$  per cent. independently,—it is not allowable to add the Partial Loss



to the Particular Average in order to make the latter a claim on the policy. The Average must reach the necessary limit independently of the Partial Loss.

OF A TOTAL LOSS OF PART OF THE GOODS INSURED :—SOMETIMES CALLED A PARTIAL LOSS, AND IN OTHER CASES, PARTICULAR AVERAGE.

*The Average Clause.*

The policy contemplates in its provisions each single interest insured. When it speaks of 3 per cent. or 5 per cent. it means that proportion of the whole interest in any one description of goods. When more than one description of merchandise is included in the same interest, as when silk and tea are shipped by one person in China to one person in England, or cotton and wheat are shipped at Alexandria in the same way, the policy does not confound the descriptions of goods; each is to stand separately on its own basis as regards its warranty. But it often happens that separate interests are insured on the same policy. Although they are thus accidentally united by being on the same document, they are to all intents and purposes distinct insurances; as much so as if each had its separate policy. The claim, then, must be tested by observing whether it amounts to the necessary percentage on the entire interest, if of one kind of goods only; or on the whole value of each description of goods, when there are more than one contained in the interest. This distinction of species has been dwelt upon in the two late cases, more

fully mentioned hereafter, of *Entwistle v. Ellis*,\* and *Wilkinson v. Hyde*.† It is to be recollected that the use of the word "species" in law is not technical: thus, in a policy on "fruit," if there were oranges and lemons, the loss of all the lemons would not be exigible on the underwriters if the oranges remained. The botanical distinction of species is not recognised.

But when goods are shipped in separate packages, a concession is usually made by the underwriters that they will not only pay a claim if it amount to the warranted limit on the whole interest, but also if it rise to the limit on certain specified divisions of the interest. This permission is legally pronounced to be *cumulative, and not restrictive*; that is, it confers an additional advantage to the person insured, and is not to act against him by taking away any part of his original right. This is called the Average Clause. It is fixed variously. In some particular trades it amounts almost to a custom; as with West India sugar, where the clause is almost invariably, "to pay Average on each 10 hogsheads, of following landing numbers." In other cases it depends upon the desire of the assured or the views of the underwriter. But if it is wished to avoid disputes when a claim arises, some agreed Average clause should always be inserted in the policy. The general intention is to give the assured considerable protection, but not to reduce the subdivisions of an interest very low. Thus we see such Average clauses as the following;—"On each Bale of Silk." "On each Case or Seron of Indigo

\* Common Pleas, Nov., 1857.

† Common Pleas, Feb., 1858.

or Cochineal." "On each five, or each ten Bales of Wool." "On each twenty Bales of Cotton." "On each ten Chests or twenty Half Chests of Tea." "On each fifty, or one hundred Bags of Sugar or of Rice." "On each Case or Bale of Manufactures." "Each Cask of Hardware." Sometimes it is specified that these subdivisions, or series as they are called, are to be connected by their coinciding with following invoice numbers; sometimes with following landing numbers; sometimes the option of either is given. But in the quantity contained in a series, in the order in which it is to be taken and other matters, there is a wide range for various stipulations between the assured and the assurers.

The introduction of the Average Clause is, of course, of great advantage to the assured; for by its action a comparatively small loss becomes claimable against the underwriters. Thus, the loss of a single package is 5 per cent. upon 20 packages, and the loss of a package and a half is 3 per cent. upon 50 packages.

These preliminary remarks embrace generally claims for damage to all descriptions of goods. We will now see their bearing upon that part of the subject immediately before us.

If, owing to perils of the sea, a Ship laden with a cargo in bulk, such as wheat or salt, both which are warranted "free from Particular Average," by the printed memorandum, puts into a port of distress and there sells a portion of her cargo in consequence of damage, the loss by that sale would not be allowed

on the policy. Our practice has changed in this respect within our own recollection; for previous to about twenty years ago it was customary to pay as a partial loss any loss which might happen to the wheat, &c., at an intermediate port; but since then it has been decided that the warranty of "free from Average" still interferes, and that there can be no claim for loss on a cargo in bulk unless the whole of the cargo was sold damaged.

If, however, goods insured "against total loss only," are of different kinds, and a portion of the interest insured be saved, there may still be established a claim for total loss:—of course, minus the value of what is saved. (*Wilkinson v. Hyde*, Common Pleas, Feb., 1858.)

But the case is different with those goods which are not warranted free from Average. The very circumstance of their being contained in separate packages seems to form the distinction between them and goods in bulk. And while a claim cannot be maintained for a quantity of wheat pumped up on the voyage, and so absolutely lost, yet a package that by an accident of the seas slips out of the slings when it is being loaded on board or landed from the ship is claimable. Until the year 1856, it had been considered to be decided that the entire loss of any one package, however small, was a total loss of that package, and, as such, recoverable from the underwriters; so that the total washing out of one or two bags of sugar or saltpetre, for example, was a total loss of part, and as such payable by the

underwriters. But though the authority was high, this doctrine had always by many been doubted; at any rate, it had very rarely been acted upon. It was considered that the entire washing away of the contents of a package was not different in essence to the washing away of half or of any other proportion of the package: it was merely a difference in degree, and did not change the nature of the loss:—that decrease in quantity in perishable commodities is a thing anticipated, like the depreciation in value; and that though it may be legally termed a *loss*, or a *total loss of part*, it is really and strictly a Particular Average, and must be subjected to the test of coming up to the required proportion or the percentage of the warranty.

The question was not likely to arise in packages of manufactured goods, which are usually declared subject to Average on each package, by the warranty; nor upon some descriptions of goods which are shipped in large packages, such as West India sugar in hogsheads, when the entire loss of a single package forms always a loss exceeding 5 per cent. on the number allowed by the Average clause. In the latter case, whether a hogshead were entirely washed out by sea-water whilst in the ship's hold, or were lost in shipment or discharging by a boat being swamped, or by slipping out of slings or canhooks whilst being raised or lowered, it is claimable under the same conditions as Particular Average, and it would not be more privileged than that. It would be claimed in virtue of the loss reaching 5 per cent. on the value of a series of 10 hogsheads, and not on other ground.

But the law has been settled lately on this important subject by the very lucid judgment delivered in the Court of Common Pleas by the late Chief Justice Jervis. It was one of the last of that quick-sighted judge's public acts, and it is full, elaborate, and convincing. I have thought it desirable to give the judgment of *Ralli v. Janson in extenso* in an Appendix, No. 1. It will be seen there that the late learned judge of the Common Pleas shows the distinction between *separate packages separately valued and insured*, and packages in which *bulk cargoes* are sometimes packed for convenience but without the intention of making them packages separately valued and insured. The cargo of wheat which was the groundwork of the action happened to be packed in bags, and some of these were so damaged as to be utterly worthless. But it was never contemplated by underwriter or merchant that the circumstance of the wheat being in thin bags was to affect the principle of the indemnity, or change the usual warranty of a bulk cargo, "free of Particular Average." The judgment abolishes the *prestige* created by the expression *total loss of a part*, and looks only to the absolute intention of the parties and the animus of the policy, which is to keep the underwriter free from loss arising from deterioration or destruction by seawater except it be complete of the entire shipment. So that four bags of sugar quite destroyed out of a series of one hundred bags are not claimable, because they do not amount to 5 per cent. on that series of a hundred. When the intention of the parties is really

to make a virtually separate insurance on each package, so that a single package shall be claimable if lost, it is so expressed in the policy. Thus we often see wool declared "to pay Average on each bale." If on the contrary the insurance is on goods which from their nature make a restriction of the underwriter's liability to entire destruction necessary, the factitious distinction of putting the article in bags, giving it no materially increased safety and of course not affecting its inherent qualities, will not operate against the insurer. We remember the underwriter of an insurance office being much astonished when it was explained to him that oats which he had been insuring largely from Ireland were not in casks. His policies were usually on so many *barrels* of oats, a measure of corn in Ireland, and he learned with surprise that the grain was shipped in bulk.

We conceive, then, that the late decision rightly apprehends the spirit of the Average clause and the essence of the question; and that it protects insurers against claims in consequence of sea damage when declared *free*, or liable under certain limitations, although the claim is put in a new form, and is called by another name. What the real intention of the parties was at the time of making the insurance, is frequently determinable by the rate of premium, for that will generally show whether the underwriter took a limited risk, or a very hazardous one, on himself.\*

\* Since my first edition, the cause of *Entwistle v. Ellis* has been tried (Common Pleas, Nov., 1857). It confirms *Ralli v. Janson*,

*Loss of Boats in Shipping and Discharging.*

We have referred to goods being lost whilst loading on board or discharging from the ship. If a package be lost whilst being raised or lowered, before a claim can be made on the underwriters for it, it must be shown that the loss did not arise from want of care and precaution;—that, for instance, the tackles employed were of sufficient strength for the purpose; it must be shown to have been occasioned by an accident or peril of the sea and not from the ordinary mischances which attend marine and all other affairs.

*Loss in Boats or Craft.*

The wording of the policy protects the interest insured until it is safely landed; so that even if boats or craft be required for that purpose, any loss accruing

but is not so leading a case, on account of the technical nature of the judge's reasoning, which turned mainly on the restriction of after-declarations on a warranted policy. The insurance was on "Rice, free from Particular Average." The assured afterwards declared on the policy the number of bags constituting the interest, and their value, at per bag. It was clearly laid down that such a subsequent declaration is not allowed to defeat the very animus of the contract between the underwriter and assured, viz., that the rice should be free from claims for particular average.

During the trial of *Wilkinson v. Hyde*, cited above, Justice Byles said, "Since the decision of *Duff v. McKenzie*, the expression 'total loss' is ambiguous, and may mean a total loss of the whole thing insured, or a part, *secundum subjectam materiam*."

However, looking at the subject from two angles, viz., *Ralli v. Janson and Entwistle v. Ellis* on one side, and *Duff v. McKenzie* and *Wilkinson v. Hyde* on the other, it assumes a stereoscopic roundness, and may, for the present, be considered as almost set at rest.



from their use would fall on the policy. But at shipment this risk requires a further provision to be added, because the insurance is only declared to be "from the loading thereof aboard the said ship." The usual clause supplied in writing, however, provides for "risk of craft," &c., at each terminus of the voyage.

The great commerce which the shipment of grain in the Danube has occasioned, and the peculiarities of the navigation of that river, have required some special stipulations in policies from the Black Sea to make them effectually cover all the risks of that particular trade. In nearly all cases, loaded vessels before attempting to cross the Sulina Bar reduce their draught of water by discharging part of their cargoes into lighters, and taking it on board again after they have passed the Bar. It is frequent now in these policies to provide for the loss of such lighters by declaring each lighter of grain to be a separate interest; meaning only until the corn is received on board again.

In some places the use of lighters in landing the goods is unavoidable and constant. Hamburgh is a port of this description. In other places the transit in craft is very long. Goods intended for St. Petersburg have to go all the way from Cronstadt in steam and other lighters.

In the ordinary course, a boat-load of cargo insured by the entire bulk is not claimable on the policy unless it amounts to the prescribed limit or percentage on the whole cargo; and with free-from-average

insurances it is not claimable at all, though the whole boat-load perish. The risk is one, both in the vessel and in the lighters or boats, except otherwise stipulated in the policy; and it ought not to be attempted to bring in a claim by a side wind.

ON LOSS WITH SALVAGE; SOMETIMES CALLED A SALVAGE LOSS OR A PARTIAL LOSS, AND SOMETIMES A CONSTRUCTIVE TOTAL LOSS.

When a vessel having met with damage at sea has been obliged to put into some port for repair, it is very commonly the case that a survey is held on the cargo to ascertain its condition and whether it has been injured by access of seawater. If damage be suspected this is almost invariably done. The surveyors who have been appointed to inspect the goods, not only report on their condition but usually advise the course which should be adopted in respect to them. The sound are, as a matter of course, to be reshipped; those that are very slightly injured the surveyors frequently recommend to be dried or otherwise put into condition and sent forward to their destination; but when they find goods materially damaged they most generally advise a sale of them on the spot. This is done, first, because it may be the only means of saving *any part* of their value,—damage in some cases being progressive when once commenced, and it may go on even to the entire annihilation of the species of the goods. Secondly, the damaged goods by remaining in the ship may

occasion injury to other goods in their vicinity, and, indeed, they may deteriorate a whole cargo by their presence.

The claim on goods thus sold at an intermediate port is called a Partial Loss, a Salvage Loss, or, a Loss with Salvage. The name is of no very great importance; the original idea connected with such loss is, that the work of destruction is going on in the goods; that if it be attempted to carry them on to their destination they will arrive there valueless, and that therefore the selling them at an intermediate port is the only means of saving part of their value to the parties concerned.

This was the argument in the cause of *Roux v. Salvador*. The subject-matter of the insurance was hides, shipped on board the *Roxelaine* at Valparaiso, bound to Bordeaux, and warranted "free from Particular Average." The ship owing to stress of weather was obliged to put into Rio de Janeiro. The hides were found to be so much damaged that it would be impracticable to carry them *in specie* (that is, in their own character and form of hides) to the end of the voyage,—they being in such a state that they must either have been annihilated by putrefaction, or thrown overboard. They were sold for one-fourth of their value. It was held that this was a loss total in its nature. Lord Abinger in delivering the judgment of the Court said, "If the goods once damaged by the perils of the sea, and necessarily landed before the termination of the voyage, are by reason of that damage in such a state, though the

species be not utterly destroyed, that they cannot with safety be reshipped into the same or any other vessel; if it be certain that before the termination of the original voyage the species itself would disappear, and the goods assume a new form, losing all their original character; if, though imperishable, they are in the hands of strangers not under the control of the assured; if by any circumstance over which he has no control, they can never, or within no assignable period, be brought to their original destination; in any of those cases the circumstance of their existing in specie at that forced determination of the risk is of no importance. The loss is in its nature total to him who has no means of recovering his goods; whether his inability arises from their annihilation, or from any other insuperable obstacle. In the case before us, the jury have found that the hides were so far damaged by a peril of the sea, that they never could have arrived in the form of hides. By the process of putrefaction and fermentation which had commenced, a total destruction of them before their arrival at their port of destination became as inevitable as if they had been cast into the sea, or consumed by fire. It appears to us, therefore, that this was not the case of what has been called a *constructive total loss*, but an absolute total loss of the goods: they could never arrive; and at the same moment when the intelligence of the loss arrived, all speculation was at an end."

. Here then is the case, put in its strongest form, of goods sold at a port short of their destination. Per-

haps no objection would be taken to this argument in applying it even to goods declared "free of Particular Average,"—and by that is really meant, free from loss by deterioration in quantity and quality by sea perils,—and subject to the risk of total loss only, if it could be absolutely shown that the goods would never arrive at their destination in the form under which they were shipped, but would at the end of the voyage exist only as dung or a nuisance, or have disappeared altogether. But to predict this of goods appears to me to be past the power of any surveyors. So that the theory could scarcely ever be applied to an actual case. And then if the circumstance of the assured's impotence to interfere be allowed as a cause of throwing the responsibility on the underwriters, there can be shown to be a variety of other cases where an assured has no option or control in proceedings affecting his interests, and yet that circumstance does not conclude his underwriters, but they claim to have the question decided upon its true nature and merits.

If we look at the argument in a less strict light it amounts to this ;—that there are cases where it is advisable to sell damaged goods at an intermediate port : and that on the supposition that the goods are so much damaged that they are on their way to entire destruction, it is certainly an expedient measure to sell them whilst something of them remains, and thus rescue part of their value which is diminishing every hour. It is the case, therefore, not of an *absolute total loss*, nor of a *constructive total loss* ; but of a

*possible* and *probable total loss*; and that checked at such a time that it is converted into a *loss with salvage*. This is to remove it from the warranty of "free from Particular Average," or "free from Average under 3 or 5 per cent." A whole cargo of corn would in this way become a claim on a policy, although that article is free from Particular Average, if every grain of it were sold at an intermediate port and for the reasons just given. But nothing less than the sale of the whole interest in corn would suffice. Anomalous as are some of the shapes in which Total Loss makes its appearance, it has not gone the length of being asserted that there can be a total loss of an entire cargo when some of that cargo is delivered sound at its place of destination. With goods in bulk, a loss must be of the entire quantity. It is true that up to a period previously mentioned the sale of a *portion* of a cargo of corn at an intermediate port was allowed to be claimed on the policy, but after that time it was decided that there can be no division of goods in bulk insured free from Average. See ante, p. 144, and Appendix, No. 1.

In the case of goods subject to Average above the prescribed percentage the practice is simpler, because the limit required is most likely to be passed where goods are sold at an intermediate port on account of damage; and consequently the question does not arise: but in theory, I think it is almost more difficult to reconcile the principle with the reasoning given above. And, indeed, when manufactures and other

merchandise of a permanent nature are declared free from Average, it is very hard to see the ground upon which that warranty is to be defeated by a voluntary sale at an intermediate port. For it must be borne in mind that when an underwriter insures goods "free from Particular Average," he does so at a lower premium than that which he receives for an insurance against all risks, because it is understood that damage to the thing itself which he insures is excluded from his risk, and that his undertaking is really against total loss and General Average only. And it seems like a mere evasion to say, that sea-water damage in London is not at his risk, but sea-water damage at any port on the way to London is at his risk: and that the dictum of a foreign merchant or agent (perhaps interested in having the goods sold at the place where he lives), or the voluntary act of the master of the vessel, can change the specific nature of a thing and convert that into a loss which, without that dictum or that act of volition, would not have been a loss but only an Average for which the underwriters were not responsible under their contract. For it is unlikely to be commonly the case, although it may sometimes happen, that packages of manufactured goods, for instance, being damaged by sea-water, are in danger of undergoing such a still-increasing amount of depreciation that before they could reach their intended port of delivery they would have lost all value and even their species. Yet this is the implied reason for their sale short of their destination; and this is the probable contingency

that would change the nature of Particular Average into Salvage Loss.

However, the case stands thus. The surveyors on goods at the ship's port of distress ascertain that certain packages are sea-damaged, and they recommend that they should be sold there. The notification of the intended sale has frequently added to it the expression, "for the benefit of the underwriters." These words are probably inserted as a sort of notice of abandonment, and to make a claim on the insurers more complete; but their effect is mischievous, and very often they are supposed by purchasers to mean that this is a privileged sale where that vague personality "the underwriters" being concerned, buyers may obtain goods at what prices they like to offer. In adjusting a claim in the policy the insured value of the damaged goods is taken, and the proceeds of sale are deducted from it, all charges and commissions having first been deducted from the produce of the sale. The net proceeds are accounted for to the merchant. Theoretically they are given direct to the underwriters, and these pay the whole value of the goods as insured to the merchant; but in every-day practice the underwriters pay over the balance to the merchant, he having received the proceeds of sale. The only difficulty likely to arise is in case the net proceeds should be lost and never reach the merchant, for he would then have greater difficulty in showing that the charge and remittance of them were at the risk of the underwriter; against which it might be attempted to prove



that it was a recognised custom for the merchant to take the proceeds in part payment, and in doing so he accepted the risk of realizing them.

*As to Deduction of Freight from Proceeds.*

The great question that has risen on the subject of salvage loss of goods relates to the freight. It must be premised that the English law does not recognise distance, or *pro rata*, freight. It is allowed by foreign codes, and the generality of its prevalence would lead to the supposition that it is found a convenient arrangement. But the English law looking to the mutual contract of the Bill of Lading sees an absolute promise given on the shipowner's part under the master's signature, that the goods shall be conveyed to their port of destination, (the act of God, &c., not preventing,) and upon true delivery there, the freight agreed upon in the Bill of Lading or by the charter-party shall be paid by the merchant who receives them. Here is a contract complete in itself, and one that is not separable. If the goods are delivered in good order the freight is to be paid. If they are not so delivered no freight is due. It is the greatest practical guarantee for the completion of the contracted voyage and the safe delivery of the goods. But suppose that it is impossible to carry forward the damaged goods from the port where the ship has been obliged to put into to their destination. Suppose, as in the case of some perishable commodities, it is unlikely they will ever reach their destination *in specie*, in their original and proper form of goods.

Then it is useless for the captain to carry them on, for when they arrive, the merchant will not recognise them, will not receive them, and so no freight will be gained. Or suppose that they are dissolving away, as salt will dissolve, and that it is probable that when the ship arrives she may be quite empty. What is to be done about freight at that intermediate port? The freight is quite as much lost to the ship as the goods are to their owners. They are lost in exactly the same sense—viz. in the certainty that if the voyage be continued they *will be* lost. Is the captain to adopt the proceeds of sale for a payment of freight, *pro tanto*, supposing them not to produce sufficient to discharge the whole; or, is he to secure his whole freight when the proceeds are more than sufficient? Or, is he to lose his freight by non-delivery at the appointed place as covenanted by the Bill of Lading?

Up to within a few years the claim for freight was paramount, and it was deducted from the net proceeds of goods sold. The underwriters on freight or the shipowner thus escaped free, whilst the underwriters on cargo, or the proprietors of it, had the sales of their goods diminished or entirely consumed by the deduction of freight,—although the voyage had never been completed. This was evidently wrong and unjustifiable. If it were absolutely necessary to sell goods at once at that intermediate port in order to save something from a progressive destruction, the owner had no right to his freight, because it never could have been earned. It was irrecoverably gone, the contract could never be completed; and the sale was

for the benefit of the persons interested in the goods themselves, because by a sale something might be saved out of the wreck of the property.

But there was a better argument in favour of the owner in cases where there was no fear of the entire destruction of the damaged goods by continuing the voyage. There was an argument in his favour in all cases where it was probable that the goods could be delivered at least *in specie*;—for if so, the freight would be earned. In these cases, then, the captain's allowing the damaged goods to be sold upon the recommendation of surveyors was a voluntary act, done in consideration to the goods—not to benefit the shipowner: for he, so long as the goods could be delivered at their destination, as goods, would receive his freight; and a permission to let them be sold at any intermediate port was to give up his lien upon them,—was himself to defeat a contract which it was to his advantage to fulfil.

It was upon this ground that it became customary in case of sale of goods at an intermediate port for the shipowner to take his freight in full from the proceeds, where that was possible. We can readily fancy cases where it would be more profitable to sell manufactured and other goods damaged, at once, than to wait till a progressive damage had greatly diminished their value, which would be the case by the time they arrived at their port of destination, although there might be no expectation of their entire destruction so as to prevent their being delivered *in specie*. Therefore, when damaged goods were sold under recom-

mentation of the proper persons in such matters permission was asked, or implied to have been asked, of the captain that they might be sold: and a proviso was made on behalf of the owners, or implied to have been made, that if the permission were granted, the giving up of the goods there was to be taken to be a delivery in terms of the Bill of Lading, *quasi* at the place of delivery therein named.

The circumstance which raised a discussion on the subject, and altered the practice, was the disproportion which the freight bore to the value of certain goods. So that if goods were only slightly damaged, and were recommended to be sold by competent persons at an intermediate port, that slight damage was frequently turned into a loss against the underwriters either almost or absolutely total, by the deduction of the freight.

The underwriters who first demurred were some Indian insurance offices. The goods were rice shipped from India for Europe. The vessels put into Mauritius, where the rice was sold damaged; and the freight being deducted, only some small proceeds in some cases and no proceeds at all in others were left. The offices resisted the deduction of freight from the proceeds. They argued that on perishable goods the freight is as much at risk as the goods themselves, for it is contained in them. If it were sugar, and half the cargo actually dissolved, half the freight would disappear simultaneously. And the abstraction of quantity was only a more tangible and apparent parallel to the abstraction of value. The freight sym-

pathizes with the goods which are the mother of it; and therefore when there is a loss on goods by sale at an intermediate port, a loss on the freight is established at the same time and should be claimable on the freight policy, if it be insured.

Such may be stated to be now the practice. The exceptions to it are when a foreign ship bound on a foreign voyage puts into a foreign port; and then under the sanction and authority of proper persons the question of freight is settled on the spot, either by deducting the whole freight, or freight *pro rata*, from the proceeds before paying them over to the proprietors of the goods sold. Such arrangements are generally found to be irrevocable; there is no remedy, and the underwriters on goods must submit to them.

#### OF PARTICULAR AVERAGE ON GOODS.

Particular Average consists of claims for damage to merchandise by sea-perils which arise at the port of destination. Thus they are distinguished from those Salvage Losses of which we have just been speaking; for *they* take place at some intermediate port, and are settled by deducting the net proceeds from the insured value. But Particular Average is adjusted in a different manner, and is a more delicate test of the quantity of sea-damage which exists in the goods on their arrival at the place where they were intended to be sold.

And, first, it will be well to get rid of the notion

that the best and simplest plan to settle an Average on goods is to deduct the proceeds from the insured value. It can be shown that this method of claiming for damage can rarely be correct: for by it if goods come to a rising market they may sell so well, so much higher than it was expected they would, that though they were really heavily damaged only a small claim, or none at all, will result: whilst, as the converse of this, goods arriving at their destination to a depressed and falling market, though really damaged ever so little, might establish a claim of 50 per cent., or upwards, on the policy. Now this is clearly a wrong and unintended state of things. It is involving underwriters in the fluctuation of markets,—a risk they never take upon themselves; the object of the insurance they grant being against sea-perils only. Suppose that during the sudden rise in the price of sugar, which we witnessed a short time ago, a cargo had arrived in London so much damaged by sea-water as to be equivalent to an absolute loss of one-third its quantity: *i. e.*, as if one-third of the bags had actually been washed out; but instead of the selling price of sugar being 40*s.* a hundred-weight, as was expected, it sold at 60*s.* a hundred-weight, the rise in price would nullify the actual loss on the sugar, and the merchant would have no claim on his underwriters in the face of that known loss which his goods had sustained. The opposite case to this can readily be imagined. The smallest quantity of damage, merely sufficient to give a pretext for making a claim on the underwriters at all, would cast upon them all the

effects of an unsuccessful speculation; a state of things never contemplated in the system of insurance. These contingencies and these erroneous results are avoided by applying the principles of Particular Average to claims for damage to goods. When once understood the theory is perceived to be just and consistent in itself. It is this. *Price* is resorted to only as a *measure of deterioration*. The loss or damage sustained by the goods resolves itself in the eyes of purchasers into a difference in monetary value. In perishable commodities the loss of weight and quantity is ascertained in an independent manner, in general, viz., by a comparison of invoice weights with sale weights, or by separating the sound packages and finding their mean or average weight, &c.; and then, having calculated what the damaged packages should have weighed, comparing it with the actual weight rendered by the damaged packages, by which process the loss, as far as weight is concerned, is discoverable. The depreciation in quality or condition must be found by testing the price which can be obtained for the goods in their damaged and imperfect condition with what other goods of similar original quality produced, or by the price which skilled persons, such as brokers and merchants, state they would have realized if sound.

In making this comparison the points to be particularly cared for are, that the two values between which it is instituted be taken in the same place, and be taken for the same time. If this principle be deviated from, the comparison will be made between *unlikes*,

and no true result will be attainable. It would again involve the fluctuation and local differences of markets. If, therefore, the sound price be certified by a broker or merchant, it must be the price of the day on which the damaged is sold, and in the same market. And if the sound price be ascertained by observation of actual sales of sound in the same place and on the same day with the damage, regard must be had that the *quality* is the same in both cases, and that the conditions of each sale as to discount or credit are similar.

Thus, it is not allowable where sea-damage exists in part of a cargo, the whole of which had been previously sold *to arrive*, to assume the *agreed price* for sound value, and the *actual sale* of the damaged goods after the ship's arrival for their worth in their depreciated condition : a valuation must be given of their price on the day on which the damaged goods were sold.

In most places, except London and Liverpool, damaged goods are sold by auction, and sales by auction are almost invariably made for cash ; whilst sound sales and estimates of sound price are nearly always at a credit. Again, therefore, to prevent a comparison of dissimilars, reference must be had to the value of money ; and both prices must be put on the same footing ; both must be either for credit, or for cash.

The foregoing points being kept in view, it will follow that it is a matter of no moment whether markets be high or low when the damaged goods are sold. If they be high, there will be a greater price gained



for the damaged as well as for the sound. If they be low, both sound and damaged will feel the same influence, and will maintain the same proportion to one another; that difference, whether high or low, being the measure of the damage the goods have received.

I must add that although theoretically it is quite true that fluctuations in markets are of no consequence, because we are only regulating *difference* in price,—practically, it makes a great difference to the underwriter whether the market be buoyant or depressed. For on a brisk and upward market damaged goods always sell nearer to the sound price than they do on a dull and sinking one. Competition, conveniently small lots, &c., often cause the damaged goods to sell at a price nearly approaching, or even quite equivalent to, that of the sound. But it is very different with a falling market,—a market sick with an over-supply of that description of goods which has been damaged. Buyers scarcely caring to purchase the sound lots will hardly look at the damaged, and the distance between the two prices becomes greater. This, however, is, as I have mentioned, only a practical inconvenience. It does not impugn the general principle.

When the relative difference between sound and damaged is ascertained,—I mean, now, involving difference in quantity and quality,—it is next to be applied to the sum insured. It is not the actual amount of difference between sound and damaged that the underwriters are necessarily liable for, but the *proportion* or ratio. So that suppose 80% be in-

insured on a package of goods, the sound value of which proves to be 100*l.*, and which sells in its damaged condition for 80*l.*, the actual difference is 20*l.*, or 20 per cent. loss. But the underwriters have not received premium on 100*l.*, but on 80*l.* only, the sum at which the package was mutually agreed to be valued at in the policy. They cannot, therefore, be made to pay the whole 20*l.*, but they will pay 20 per cent. on the amount they have insured, viz. on 80*l.*, which is equal to 16*l.* And conversely, if the goods be insured for 80*l.*: their sound market price be 60*l.*, their sale 40*l.*; the actual difference is 20*l.*, or 33½ per cent. The underwriters having insured more than the actual value, are liable for the ascertained proportion of damage, and must pay 33½ per cent. on 80*l.*, or a sum of 26*l.* 18*s.* 4*d.*

But in general it is not the case that the insured value exceeds the sound value; and for a reason which will be understood by observing in what manner the two values are composed. A shipper of goods has usually the object in view when insuring, of securing or covering himself for the cost of what he has at risk, including often his expected profit; and inasmuch as insurance is an expensive advantage, he does not needlessly wish to throw away money by paying premium on a sum greatly exceeding what is required to make him secure. For, as safe arrivals immensely exceed losses in number, by insuring an excessive value on his shipments, he would in the long run lose more by the unnecessary premiums paid than what he has gained in cases of claims for loss.

and Average. What a shipper properly and prudently insures is, 1—the invoice cost of the goods: 2—all charges incurred till the goods are on board the ship: 3—a reasonable percentage of expected profit,—perhaps 10 per cent.: and 4—the premium of insurance itself, together with commission for recovery in case of loss. I do not say that every shipper goes methodically through this process of synthesis, for he probably puts on a value by guess which includes all the above, but it shows to what extent a prudent shipper may and should insure. If freight be payable at the port of shipment whether the goods are safe or lost, that also becomes one of the charges to be added to the invoice, numbered 2 in the above list.

If it is the receiver of goods who insures, he insures a sum either based upon the invoice with the addition of profit, &c., or based on the net price of the commodity prevailing in the market where his expected shipment is to arrive. But in either of these cases, neither the shipper or the receiver of goods considers it necessary to throw away premium by insuring charges which are uncertain, and conditional on the safe arrival of the goods. Freight paid on delivery, and duty, cannot be demanded if the vessel be lost, therefore he is unconcerned about them,—they are not his risk. And so with any other particular charges which would be paid on goods that arrive safely. If the goods do not arrive, the charges will have no existence.

Thus we see of what the insured value is composed.

And now let us ask what it is that makes up the market value, or sound price. First, there is value of the commodity itself, enhanced, we may presume, by its being in a place of consumption: 2—there are included in the selling price or market value the various charges of landing, &c., to which goods are subject before they can be delivered to consumers: 3—there is the freight, paid on delivery of the goods by the ship: 4—there are the import duty, municipal dues, &c.: and 5—there is the merchant's commission. It is plain that unless the selling price includes all the above, there will be a loss on the shipment.

Now observe the action of this. The goods on which a claim is about to be made have these charges included both in their estimated or compared sound value, and in their actual selling price. But, with the exception of profit, they are not included in the insured value, so that as a general rule the sound value will be higher than the value insured. Not always, indeed, because fluctuations in markets will sometimes leave the value insured higher than the market value, in spite of the additional charges and expenses,—but, as I say, it will, in general, be the contrary. Let us, then, suppose the following case:—Insured value of goods, including all charges, imaginary profit, and cost of insurance, to be 100%.—

Sound value in the market the same	.	.	£100
Increased by freight	.	.	10
Ditto by duty	.	.	35
Ditto by other charges	.	.	5
<hr/>			
Making together	.	.	£150

That being the price at which the goods are quoted in the market, but which when analysed is seen to consist of the ingredients given above.

The analysis of the selling price, or damaged value, will be—

Value as above . . . . .	£100
Less depreciation in quality, say one-fifth . . . . .	20
	<hr/>
	£80
Increased by freight . . . . .	10
Ditto by duty . . . . .	35
Ditto by other charges . . . . .	5
	<hr/>
	£130

The loss on the sound value is, thus, 20%, or 13½ per cent. But only 100% has been insured; which being deteriorated in like proportion will give 13% 6s. 8d. for the claim of Particular Average against the underwriters, instead of 20% the actual sum lost.

It may be objected by some persons, as it very frequently is objected, that by this process the merchant loses on the transaction; that he only makes a partial recovery of his loss upon his policy. And farther, it will be demanded, as it very often is demanded, why he should not without circumambulation first deduct the net produce of the sales from the sum insured, and claim the difference from the underwriter. Or, in case any law or custom prevents this short method being adopted, why the basis of the claim should not be the net value of the goods at

their places of destination and sale ; i.e. the price stripped of duties, freight and charges, for that would approximate to the sum insured, and there would then be little or no difference between the amount of actual loss and the amount of recovery from the underwriters.

Now, as to the first of these two questions, I think I have already to a considerable extent answered it by showing, above, that the process of deducting the net proceeds, and which is called partial loss, involves the underwriter in the risk of rising and falling markets,—a risk he did not take upon himself when he underwrote the policy. On a falling market it would be manifestly to the advantage of the merchant to have this method adopted, supposing the goods to be insured at the mean or average price prevailing at the place of sale ; and I stated that on a very gaining market there might be a very considerable loss in quantity and quality on the goods, and yet the merchant might recover nothing because of the rise in price of the goods at the time they were sold. But in a less extreme case it is clear that by thus virtually giving over the goods to the underwriter, for better or for worse, whilst the underwriter in some cases would be subjected to a loss in price in the thing itself dependent on a fall of the market,—in the contrary state of the market, the merchant would have given away his profit to the underwriter.

An example will make this plain.

Suppose the insured value to be 100%,—that being

also the true average value of the goods in the market:—

Ordinarily they would have produced the mean net value of . . . . .	£100 0
They have actually lost in quantity one-fourth, or 25 per cent. . . . .	25 0
	<hr/> £75 0
There is a rise in price at the time of 15 per cent. . . . .	11 5
	<hr/>
The goods actually produce in the market the net sum of . . . . .	£86 5
Insured value . . . . .	£100 0
Deduct net proceeds . . . . .	86 5
	<hr/>
Recovery from the underwriters . . . . .	£13 15

Instead of 25%, which it could be demonstrated the goods had really lost in quantity alone. So that the profit the merchants would have made on this part of the shipment has been given away to the underwriters.

But we are not left to conjecture or to simple custom in dealing with such settlements. The law has laid down a rule which decides that the other method,—that of Particular Average—is the one which is to be adopted in all such cases. It is now more than sixty years since the cause of *Lewis v. Rucker* was tried by Lord Mansfield: and that settled authoritatively the principle, that a claim for damage on goods arrived at their place of destination must be made by a comparison of their sound and damaged values; and that what an underwriter is responsible for under his policy of insurance is the deterioration

of the commodity by sea-damage, but he is not to be subjected to the fluctuation of the market.

And this principle has been consistently acted upon since that time. Like most other rules this one has exceptions, but they rarely occur. When they take place it is from the impossibility of ascertaining what the real value would have been in the ordinary course. But when goods are unpacked and examined at a port where there is no market, and which only lies in the way to the place where the goods are destined to be manufactured, and they are sold at that port of transit on account of damage, it sometimes becomes necessary to treat the loss upon the salvage principle. This is really because one of the needful data cannot be supplied. Any estimate of sound value would be mere surmise in a place where there is no opportunity of using an article made for a special purpose and to be employed in a particular place. On the other hand, the principle of making the claim as a salvage loss could not be adopted as a matter of right, because it was as possible to have sent forward the damaged goods to their destination as the sound had it been expedient: but experience had shown that a sale was preferable at the port of transit rather than at the place of manufacture, where it is possible there might be no buyers at all, and where the raw material once damaged was useless for the purpose for which it was intended.

Again, there are some objects shipped which are valueless if one of the set of packages is lost or absent. Thus an organ would have no assignable



value if one or two packages containing pipes or mechanism were sold. So, too, an iron verandah which was sent out to the West Indies for the purpose of surrounding a house, was damaged by seawater to the extent of the contents of one or two boxes; the rest, being all connected with these, had no value in themselves, dissociated from the packages damaged. This would be necessarily claimed as a salvage loss; especially if the verandah had been made expressly for a particular house or purpose.

And where the difficulty of establishing a sound value is anticipated when the policy is effected, it is a safer plan, and occasionally adopted, to insert a condition, "in case of damage, the claim to be settled on the salvage principle." Thus the door is shut against dispute.

#### *Gross and Net Proceeds.*

The second question to be answered is,—it being established in what form a claim for damage on goods is to be made,—Why should not the *net* proceeds be taken against a *net* sound value in fixing the quantum of that damage? We shall see that this is a pertinent inquiry and not very easily answered if we seek only grounds of reason and consistency. We shall also see that though the contrary has been settled by law and very generally acted upon, in certain cases the application of the legal rule produced an absurdity in its consequences and was obliged in practice to be set aside, because a distinct loss of a large extent might notoriously exist on

some species of merchandise, and yet by the addition of duties, &c., a claim on the underwriters for it might be effectually prevented.

The cause which decided the *gross* proceeds to be the proper basis for adjusting a claim for Particular Average was that of *Johnson v. Shedden*, and is often referred to as "the Brimstone Case," that being the subject-matter of the insurance. It was tried upwards of half a century ago before Justice Lawrence; and in the year 1802, when a similar question was being tried, the court stated its approval of that decision.

It may be thought that in speaking of legal decisions and the judgments delivered by the Court after solemn argument at the bar, I make too free a comment upon such verdicts, and speak of principles then and in that manner laid down, as if still they remained not definitively settled. My apology is this, that whilst the sanctions of the law are to be revered, and the necessity of adhering to them if confusion is to be avoided is admitted, commerce can never be bound with the same strictness as other matters. It is so Protean, its objects are so various, its conditions fluctuate so often, that a certain degree of latitude and freedom is necessary to it. Its transactions are generally based upon particular understandings between parties, and therefore they are much to be construed by their objects and intentions, which often being very special, if those transactions are afterwards to be subjected to a general, rigorous rule, they might be often defeated. Gentlemen who

look upon the mercantile world from Lincoln's Inn and the Temple, and who see no safety in any negotiation that is not guarded by strict legal observances and documents, would be amazed at the risks and want of precaution which daily occur in the actual world of business. They would find things taken for granted, other things left to the honour of individuals, or the custom of a trade. Whilst to secure a jointure, or the payment of one hundred pounds to the right receiver, the investigating titles for sixty years past, and many skins of new parchment may be absolutely required, they would see on the Stock Exchange one man intrust a hundred thousand pounds to another upon no other security than an I O U on a scrap of paper; or one person conditionally bind himself to another in a bargain affecting either to an unlimited amount, without even that morsel of paper, with no witness present, by a mere word of mouth or a gesture of the hand. For commerce moves along on wheels too rapid to wait always for strict legal precautions. In the mercantile world frauds are often practised, the unwary are often overreached, and the designing are for a time successful; but let it be remembered that to hundreds of men commerce is a school where they learn the strictest honour and the most scrupulous integrity; and their own punctilious observance of the rights of others makes them free to believe in the uprightness of those with whom they have to deal. Moreover in regard to marine insurance there is always an element mixing with all the law which applies

to it, modifying it or restricting it, called the Custom of Lloyd's. This ingredient is, indeed, impalpable and changing, but it has great influence in the interpretation of engagements between the underwriters and the assured. And, finally, those insurances upon which no quarrel or question ever arises are precisely those which are excluded from all protection or interference of the law by their nature, and are called honour policies.

To return to the case of *Johnson v. Shedden*. The principle laid down in it was this; that underwriters are not to be liable for any loss which may be the consequence of the duties or charges to be paid after the arrival of the commodity at the place of its destination. The Court held that the calculation was to be made on the difference between the respective *Gross Proceeds* of the same goods when sound and when damaged, and not on the Net Proceeds.

Mr. Justice Lawrence began his judgment by declaring that the loss is to be estimated by the rule laid down in *Lewis v. Rucker*, that the underwriter is not to be subjected to the fluctuation of the market; (that is, that the loss is not to be stated on the salvage principle, nor by comparing the net proceeds of the actual sales of the damaged goods with the price to arrive, or, in other words, a bargain made before the goods arrived, to sell at a given price;) that the loss for which alone he is responsible is the deterioration of the commodity by sea-damage; and that he is not liable for any loss which may be the consequence of the duties or charges to be paid

after the arrival of the commodity at the place of its destination. The parties agreed that the damage was to be ascertained by considering whether the commodity was a third, a fourth, or a fifth worse: and it was also agreed that that could only be done by the price at the port of delivery. But the only question was, whether that price was to be ascertained by the net proceeds or by the gross produce. *The Court held that the calculation was to be made on the difference between the respective gross proceeds of the same goods when sound and when damaged, and not on the net proceeds.* The main stress of the argument in favour of the judgment is this, that by taking the net proceeds as the basis instead of the gross it will happen that when equal charges are to be paid on the sound and damaged commodity the underwriter will be affected by the fluctuation of the market, which ought not to be.

This then settled the law upon the subject;\* and to underwriters it is of particular importance that it should be maintained, as the inclusion of duties, freight, and charges is much in their favour. It makes the merchant divide the loss, in general, with them. For, as I have before shown, it is not for the merchant to insure freight and duties paid on arrival,—since that implies that they are not payable if the goods do not arrive, and therefore are not at

\* In the Policy of a Spanish Company, the *Compagnia General Española de Seguros*, the condition is specially introduced, that in claims for Particular Average they shall be stated on the gross proceeds.

his risk. Besides he has no legal right to insure the freight, which is the insurable interest of the shipowner. Then, the value insured may be considered to be thus: Cost of goods, + charges till shipped and cost of insurance, + expected profit. And the saleable value in the market on arrival may be taken to be, the foregoing cost, charges, and expected profit, + freight, + duties and charges at the place of destination. So that generally speaking the sound value will stand at a higher figure than the insured value; and any loss on a sale will, to the extent of the difference between those two values, have a proportion thrown off, which the merchant must bear.

The subject of gross or net proceeds has, in spite of this famous decision, been the vexed question of half a century. Each new generation of merchants coming to effect insurances stumbles at the same difficulty, and asks for information in nearly the same words. It will be useful, then, to endeavour to sift the matter thoroughly and try to come to some conclusion about it. The difficulties mainly arise from persons approaching the question from two opposite sides and, consequently, viewing it in two different lights. The special point at which we should seek to arrive, and which being apprehended would, it appears to me, go far to decide the contention, is this,—whether a particular loss in the value of damaged goods is an actual loss of part of the thing itself independent of duties and charges, which are to be considered external and accidental; or, whether that loss is a fluctuating one, dependent in a measure on those duties and charges,

enlarging or diminishing with the addition or subtraction of them. The assured invariably assumes the former to be the case, that is, the *reality* of the loss on the goods;—whilst the law seems to have assumed the latter position, viz., the *unreality* of the loss.

We will, therefore, take these two assumptions separately. And first we will put the case in a common formula. Suppose, as above, the invoice cost, + charges, + expected profit on certain goods, to be valued in the policy at 100%. Let the sound value of these goods in the market to which they are sent, viz. the long or gross price, including freight, duty and charges, be 150%. Let the gross proceeds of them in a damaged state be 100%. The loss will therefore be 50%. Consequently, if 150% have a loss of 50%, 100% insured will have a loss of 33%. 6s. 8d., which the underwriters will pay; and the merchant has to bear the difference, viz. 16%. 13s. 4d.

The merchant argues in this manner;—I am thus subjected to the arbitrary addition of freight, duty, &c., to the value; the only effect of which is to deprive me of part of the sum I should have to recover on the policy. For, the 50% deficiency is the actual deficit in the nature of the thing itself, and is the exact equivalent to what the goods have lost in quality by sea-damage. Had these goods been sold in bond and with freight and charges deducted, the same quantum of loss would have been shown on them, since that loss is actual and real. In this case the short, or net, sound value would have been 100% and the net sales 50%. The loss, therefore, still would be

50%. And as the sound and insured values would have coincided, I should have recovered my loss in full. And I am not necessarily involved in freight and duties. The true increase of value by change of place I have provided for in the profit I included in my insurance, and which the result of the sale justifies. If really there be a loss on freight let it be claimed on the shipowner's freight policy, but do not let it interfere with my goods, since it shows an untrue and imaginary value, a value which never enters my pocket, and the action of which is detrimental to me. And in regard to the duty, the underwriters always assert that they are unconcerned in duty altogether, are not to be affected by it. Let it be so: discard it from the price; and let us deal with what we are concerned, viz. the value of the thing itself.

To make this clearer, let us suppose that the goods consisted of saltpetre, and that the damage had the effect of reducing the quantity but not the quality of the goods. Suppose that 50 per cent., one half, of the saltpetre were washed away. Could any addition or subtraction of duty or charges alter that fact? Would it be right by any legerdemain of duties, &c., to make it appear that though it were certain half my saltpetre was washed out, only 33 per cent. was to be paid on the policy?

Let us take another case; one in which the freight has been paid at the shipping port, and it is customary to sell the goods in bond. Their sound value is 100%. They sell for 50%. The loss is 50%. The price given by the buyers indicates the true quantum of damage,



for they would not give more than the goods were worth. Let the insured value be, as before, 100%.

Now if this case is to be subjected to the arbitrary addition of duty in stating the Average, the damage which was fixed without mistake at 50 per cent. will be reduced proportionably to 40 or any percentage according to the duty added. So that afterwards, when the insured value is applied, 40% or some smaller sum will be only recovered, although 50% was the sum really lost by sea-damage.

Sometimes principles are only recognised when they are seen in an exaggerated condition; when the case is reduced to an absurdity. They are acknowledged then; but still are not always thereafter acted upon, because their very distortion to the extreme limit prevents their being identified with more moderate instances, which are, nevertheless, the same in nature and only differ in degree.

There are, accordingly, some exceptional cases in which the legal rule has had to be broken through, and has been customarily discarded. I allude especially to tobacco and tea. The duty on the former is sometimes as much as 700 per cent. of the price in bond; on the latter it is often between 200 and 300 per cent.\* The injustice became too grossly apparent of letting duty come between the suffering merchant and his insurers, and thus putting him out of a claim for damage sustained. When the price of tobacco is at 4d. per lb., and owing to sea-damage it only produces

\* In consequence of the reduction of the tea duty, the disproportion is not so great now.

3*d.* per lb., it is perfectly obvious that there is a loss sustained on the thing itself of 1*d.* per lb., or 25 per cent. of its value. And the value insured is generally about the same price. Now if to this net price of 4*d.* per lb. we were obliged to add the duty of, say, 700 per cent. or 2*s.* 4*d.*, we should have a sound value of 2*s.* 8*d.* per lb. And the damaged value being 3*d.* per lb., and duty 2*s.* 4*d.*, gives 2*s.* 7*d.* per lb., there will still remain an absolute loss of 1*d.* per lb., but which instead of being 25 per cent. in ratio is now reduced to the proportion of  $3\frac{18}{1000}$  per cent. And suppose the hogshead to be insured for 20*l.*, instead of the loss being 5*l.*, it would be reduced to 12*s.* 6*d.*, and would only be claimable in rare instances.

Well, then, the bonded price of tobacco has been conceded, and so also has that of tea. For take the price of Congou in bond to be 10*d.* per lb., and the difference in consequence of damage to be 2*d.* per lb., the rate of loss is 20 per cent.; and if the chest be insured for 4*l.* the claim against the underwriters is 16*s.* But when we come to add the duty of 2*s.* 4½*d.*\* per lb. to the sound and damaged prices, we still retain the absolute loss of 2*d.* per lb., but the rate of loss is now reduced on the gross or long value of 2*s.* 10½*d.* to  $5\frac{2}{3}$  per cent., making the sum claimable from the underwriters only 4*s.* 8*d.* instead of 16*s.*

Then we ask, is there anything exceptional in the nature of these two cases that takes them out of the rule, or is it that they really demonstrate the justice of all similar cases, however results may differ in de-

\* This was written before the reduction of the duty on tea.

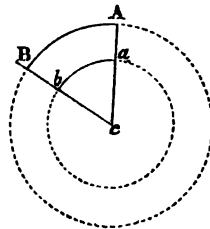
gree? The merchant, who is still supposed to be speaking, will decide without hesitation that the principle of assuming the net proceeds can only be the true one, since by the opposite course he is deprived of part of that loss to protect himself against the whole of which was his object in insuring.

Now hear the other side; and suppose the arguist to be an underwriter. First we have the law on our side; for it says that the calculation of the Average shall be made upon the *gross proceeds* of sound and damaged goods, and not *net* proceeds. We will leave out of sight the argument there used about the non-interference of duties and charges, because it unfortunately tells against the conclusion; and an umpire might possibly agree in our opponent's view for the reasons our own advocate assigns.

We cannot, perhaps, defend the principle of adding duty to goods which have been sold in bond and the sound value also given in bonded price, or ascertained comparatively from similar sound goods sold,—except on the ground of consistency, to give uniformity to that principle. Our contention relates to goods sold duty-paid, and when the sound value is given in the same way. We are not in this case building up a factitious sound value purposely to out-top the insured value, and thus to cast away part of the loss exhibited on the original smaller value; we are dealing with an actual fact; viz. that on a certain duty-paid and freight-paid price given in the market, there was a certain difference or loss arising primarily from sea-damage. This is established as a proportion or ratio,

and is applied to the insured value. If the insured value be less than that value (and it generally is less), a part of the loss will fail to be recoverable from the underwriters; it being the proportion of loss *inherent* in the freight and charges; for they, if we may use the expression, *sympathize* with the subject-matter with which they are associated; insomuch that the loss appertaining to the duty is, or ought to be, recoverable from the customs on application and proof: and when there is also a loss of quantity in the goods, the duty on the deficient part is never even levied. It is true that there are such cases, as in Sicily, where the duty is charged on the quantity deficient as well as the quantity arrived; but this extreme hunger of the customs is rare and exceptional.

We consider, then, that the larger loss on a larger sum is as much inherent in the surplus over insured value as it is in the amount of value insured. *That in dealing with larger sums merchants and brokers make proportionally larger differences than they would on smaller amounts.* It is as if the arc of a circle being  $a - b$ , that arc will be  $A - B$  when the radius of the circle is extended from  $ca$  to  $cA$ .



Thus; suppose we had the example before us of the same, or similar, goods being sold in bond and *ex* charges; and again, with duty and charges paid. We assert that something of the following result would be the consequence.

Let the insured value be 100 <i>l</i> .	Let the bonded
or short sound value be . . . . .	£100
Let the bonded or short damaged price be . . . . .	80
	<hr/>
The loss will be . . . . .	£20

or one-fifth part.

And when duty and freight are paid, let the	
sound value be . . . . .	£150
Then we maintain that the damaged price	
would be . . . . .	120
	<hr/>
And the loss consequently . . . . .	£30

or, still one-fifth.

Because we see, throughout trade, certain proportions preserved not only in the prices of several qualities *but in the differences themselves between prices*. Thus, for illustration, we see in pepper, worth, sound, 4*d*. per lb., the first class damaged will probably produce  $\frac{1}{4}$ *d*. less. Whilst in Congou tea at 10*d*. per lb. sound, the first class damaged will probably bring 1*d*. less; and in silk at 10*s*. per lb., sound price, the difference for first class damage will be 1*s*. per lb. There being a gradation in the differences we make having a relation to the price itself.

To give, once more, a familiar example. Suppose in buying a pony, 5*l*. were allowed me for a defect discovered, I should not accept an allowance of 5*l*. for the same defect in buying a hunter, but probably 20*l*. So that the *difference* a buyer makes between sound and damaged condition in purchasing goods, bears itself a relation to the price of the article.

This I imagine to be all that can be urged in favour of taking a duty-paid price as the basis for ascertaining the loss claimable from an underwriter.

And the conclusion I come to is this, that when goods are really sold duty and freight paid, and the sound value is estimated on the same scale, then, the *long price* should be adhered to in finding the proportion applying to the sum insured; but when goods are sold in bond or free from charges, then the *short or net price* is to be taken; and the addition - to it of duty and charges is an arbitrary and improper method, and does not give the true recovery to the merchant for sea-damage sustained.

#### *Excepted Articles.*

Even when the duty-paid price principle is considered to be firmly established, there are in practice numerous exceptions to the rule. I have mentioned tea and tobacco. Sugar from Havana and Brazil is also favoured, though not on the same grounds. And indeed it may be said that goods which are *invariably* sold in bond, either here or abroad, are to be calculated on the *net* and not the gross price. Where duties are so small as to affect the price in an insignificant degree, it is not of much moment whether the duty be included in the price or not.

#### *Exchange of Weight.*

The next question in reference to claims for damage to goods is in regard to the weight. Some species of merchandise increase in weight by sea-damage, such as cotton and wool. Some kinds, on the other hand, lose weight, as sugar, saltpetre, &c. Some sorts of goods vary in weight according to the weather

prevailing at the time of their being landed and afterwards. Silk is such an article; and as it is one also of great value, the difference of a single pound in a bale must be accounted for.

There are several methods for ascertaining the proper sound weight of damaged goods. When the weights run pretty evenly throughout the parcel, the simplest way is to select the sound packages and find the average weight of them in that manner. A still more exact method, and one absolutely necessary to be pursued when the packages vary very much in weight, is to select the invoice weights of the sound packages and their landing or sale weights, and thus to establish the exchange or rendiment of the invoice. The invoice weights of the damaged having been also culled out, they can be converted into English weight with exactitude.

#### *Credit and Discount.*

When there is damage on outward-bound merchandise, the unsound portions are usually ordered by the surveyors, who are frequently English merchants, or by Lloyd's Agent, to be sold by public auction: and the condition of a sale is nearly always that the price is to be for cash. But the sound value is generally given at the usual credit of the place; where it is not, it is so expressed, and is stated to be *for cash*. It is highly necessary that both prices should be placed on the same footing. Both must be for cash or both for credit, or we are again comparing dissimilars, just as much as if we took the

value of the sound at one place or time, and the value of the damaged at another place or time. In London the distinction of cash and credit is seldom made in sound and damaged prices.

*Selection of Damage.*

In all foreign parts it is highly desirable that proceedings about damaged goods should be conducted under the direction and surveillance of Lloyd's agent or, if there is not one, of the British consul. Lloyd's agent should witness each stage of the proceedings. He should appoint surveyors whom he knows to be reliable persons and acquainted with the kind of goods which they are to inspect. Where there are trade brokers he will nominate one or more to certify to the sound price of the goods.

An important object of Lloyd's agent's interference is to prevent a wholesale condemnation of goods. In some places it is customary for the merchants to have whole packages of goods condemned upon a very slight amount of damage. This is often the case with manufactures where there is only a partial damage of the contents, many pieces being sound. It is highly desirable, in justice to the underwriters, that the damaged goods alone should be sold, the sound portion being selected from them. Orders to this effect have been sent and enforced by the Committee for managing the affairs of Lloyd's to all their agents. The plan of selection cannot always, however, be carried out. It sometimes happens that the contents of a package are a set, or



assortment, and that the abstraction of part from it leaves the remainder unsaleable, or only saleable at a reduced price, although it is not sea-damaged, and may therefore be said to be sound. Again, it is often the case that goods are sent and insured to a certain great town or emporium where the damage, if any exists, is inspected, and the injured goods are sold. Nevertheless the object of the merchant in sending them to that place may be not to make it their ultimate destination, but that they may afterwards make their way into the interior of the country. And in this case, if out of 100 pieces of goods contained in a bale 70 pieces were to be found damaged and 30 pieces sound, the segregation of those sound pieces might embarrass the merchant and entail a considerable loss upon him. For he may be unable to sell them where he resides to advantage, and he cannot send up the relics of a package to the interior without their sustaining a great depreciation.

Whilst, therefore, there is great reason for endeavouring to confine the sale of damaged goods to the actual number of damaged pieces, the nature of things will not always permit this. I have known underwriters take very strong determinations upon this point, and throw out part of the claim because the sound portions had not been extracted from the bales. But they, perhaps, forget the equitable view that must be taken of *bonâ fide* transactions amongst people of good credit. They must remember that what they do not pay must fall on the assured, the shipper, who had no more power than themselves to

interfere with proceedings taking place thousands of miles away from him, and who has paid the underwriters a premium for a reasonable protection or indemnity. Nor are they to forget that the insurance on manufactures is couched in such words as these, "on packages of goods:" with a proviso in case of damage, "to pay Particular Average on each package." *A package* therefore being damaged, it may well be looked upon in its integrity. It is *a damaged bale or case*. It is not at all clear that it is to be dealt with by separation, for then the words of the Average clause in the policy might as well have run, "to pay Average on each *piece* of goods in a package." All proper precaution is to be used at the place of destination to prevent loss that by any adopted means can be avoided; but if by nothing that the agents or consignees can do a certain loss can be escaped even on the pieces not actually touched by water, the policy is anything but an indemnity to the merchant when it saddles him with a loss clearly consequential upon sea-damage. He may very properly say, "This *package* was sea-damaged, and you are to indemnify me for the loss on that package." To say that an underwriter is unconcerned in what becomes of the five, or fifteen, or thirty pieces undamaged out of a whole package, the remainder of which is sea-damaged, is nearly as unreasonable as to say that every sound fibre in a bale of hemp or a package of silk is to be selected, and that the loss on those few fibres will not be admitted by the underwriters.

Moreover it is to be considered that no real loss, or very little, ought in general to be sustained by selling the balance of sound pieces with the damaged; because their admixture will raise the price of the whole number. And it is not at all a fair method of arrangement in a case where the sales of sound and damaged pieces in a whole bale are inseparably blended, and show a certain percentage of loss on the hundred pieces, common to the whole, to deduct from the loss on the bale the percentage of damage on the insured value of the pieces sound. For those sound pieces, even supposing them to have sold at some depreciation themselves, were the redeeming portion of the package, and certainly were not depreciated either in ratio of the damaged pieces or of the common percentage. And yet I have heard an underwriter strongly assert that the sale of sound pieces with the damaged, in a package where both existed, tended rather to *depress* than to *raise* the standard of price for the whole. The assertion was as philosophical as if one were to affirm that water of  $212^{\circ}$  being poured into water of  $40^{\circ}$  of temperature, the result would be a common temperature of  $30^{\circ}$ .

Whenever, then, the damaged pieces can be selected from the sound without breaking up an assortment or leaving an unavoidable loss on the sound remainder, that course should be taken. But if it cannot be done without loss on the sound balance, then it is *the assortment or the package which is the unity insured*, and of which the underwriters guarantee the safety.

*Prejudice and consequential Damage.*

This leads me to consider the unsettled and difficult question of consequential damage. The loss left on the sound pieces just spoken of was clearly a depreciation consequential on their association with the damaged pieces in the same package. And there are various other ways in which goods are prejudiced in quality and price although not touched themselves by sea-water. The most direct of indirect damage is injury by the vapour or noxious exhalations proceeding from actually damaged goods in a ship's hold. Here, if the quality of the goods themselves, as distinguished from the external package, be reduced, there is no reason why the underwriters should not bear the loss thus produced; always bearing in mind that although the loss be only a consequential and not a direct one, it is a *real* loss, and unquestionably arises from sea-water as the first cause. The vapour may affect the appearance, and the effluvium injure the flavour of articles of delicate character.

Underwriters' liability for this species of injury was affirmed in the cause of *Montoya v. London Assurance Company*,\* where it was held that if a portion of a cargo is damaged by sea-water, and the vapour from the sea-water or the fœtid odour arising from the goods through such sea-damage injures another portion of the cargo above them, whether the same or a different description of goods, the underwriters are liable for the damage as being occasioned by a peril of the sea.

\* Exchequer, May, 1851.

But where the steam or fumes only affect the package and not the contents the question is not so easily disposed of. Tea is the article chiefly concerned, and "stained packages" of tea have long created serious discussions between the merchant and underwriter. The process of the damage is as follows. The external package exhibits stains and the peeling off of the paper, or other indications of damage. These packages are therefore set aside for inspection. The inner package consists of lead, which must be cut open; this having been done, although no damage is found to exist in the tea itself these chests come prejudiced before the buyers, from the fact that they had been subject to suspicion, and that their external condition was inferior to the others and exhibited symptoms of injury. Tea is so delicate an article that, like Cæsar's wife, it must not only be free from fault, but must be free from suspicion of fault: and the cutting open the lead is itself a detraction. But the underwriters argue that they insure the tea itself, and not the package. This is, however, erroneous. They insure both the article and the package which contains the article. I think they stand in this respect in the place of the merchant whom they insure. And if he by the consequence of sea-water be subjected in a legitimate and comprehensible manner to a loss on his goods, I cannot but conclude that the underwriters who guarantee him are bound to put themselves in his position. I shall not say more on this subject, because it happens to be one under investigation and discussion at the present time both here and in China:

and it is unquestionable that from some cause or causes great quantities of tea have latterly reached this market very much out of condition. The cause may be temporary and pass away again, and the discussions may subside.

But a lower price may have to be submitted to on tea even without the external staining,—from mere prejudice. The fact of very fine and delicate teas coming out of a ship which has had extreme damage in other parts of her cargo, gives a *prima facie* presumption that the quality of the tea has suffered. Where the circumstances of a ship's voyage are very strong, this is a sort of claim that would probably be met by the underwriters in a compromise.\*

### *Loss of Labels.*

The effects of sea-water on the external packages, though it never reach the article itself, may be very serious. With pickles, sauces, some wines and liqueurs and confectionery, the preservation of the labels is of the utmost consequence: their injury or loss makes the goods nearly unsaleable; not only because the unsightliness of the bottles, &c., acts against the retailing of them, but still more, because the kinds cannot be distinguished or warranted. Here, then, sea-damage to an external part is of as great

\* The following clause has been recently adopted by the London insurers to avoid future questions of this kind respecting tea:—

“Average payable on each ten chests following landing numbers; but no claim to attach for wet or damp in respect of any chest (or other package), unless the tea therein shall have been in actual contact with sea-water.”

depreciating power as if it happened to the substance itself in other kinds of goods; and there can be no reason for underwriters rejecting a claim in respect of this kind of loss.

### *Bursting of Bottles.*

At first sight it would seem that liquids in corked and capsuled bottles, as champagne; or corked and tied only, as ale and beer,—would be particularly free from effects of damage. It is not always so, however. The straw in which the bottles are packed becomes wet, rotten, heated; then the corks fly and the bottles burst, and there is often under these circumstances a great amount of damage. This, too, is claimable of the underwriters.

Furniture also suffers much when the straw with which it is packed in crates and cases gets rotten. The support being gone, the furniture becomes loose in the package and breakage ensues. Even marble tops of tables and washing-stands are broken in this way. Sea-water, too, and vapour destroy the polish, and dissolve the glue in the joints.

### *Liquids.*

The liability of all liquids to loss by ullage proceeding from the casks leaking, even where no specific injury has happened, is so notorious that it makes claims on liquids difficult to settle with underwriters. Some of the latter even maintain that they are not liable in respect of loss of liquids. This is a clear mistake; and unless they insert the warranty which

exists in several East Indian policies excepting loss on liquids they are not exempt from claims. But as ullage or leakage is of so common occurrence, it requires very clear and definite evidence that there was violence or some real cause of loss on the voyage, and that the loss of the liquid was not the result of faulty or unseasoned packages; neither that it arose from imperfect quoining and stowage. It is necessary to show by the ship's protest that at some period an undue and accidental pressure was exerted on the casks. The disturbance of the stowage of cargo by a ship being thrown on her beam-ends, or by striking the ground suddenly, is sufficient to account for pressure and consequent loss. But even when a claim is established, the ordinary loss by ullage which experience has ascertained should be deducted from it. The law does not lend much countenance to the setting up the "usage of Lloyd's" against underwriters' general liability. So in the present instance; when it appeared that oil had been lost by leakage, caused by the violent labouring of the ship in a cross sea, Lord Denman refused to admit evidence of a usage of Lloyd's to the effect that unless the cargo was shifted, or the casks damaged, underwriters were not liable for any extent of leakage, however caused, as a loss by the perils of the seas. His lordship told the jury to consider for themselves whether in their opinion the damage to the oil was in fact caused by the perils of the seas. "It may be very convenient," said his lordship, "for the underwriters to have such a general rule, and for the commercial world to submit to it; but if they



mean thereby *to control the effect of a plain instrument*, they should introduce its terms into the policy." \*

Liquids that are packed in tins, such as castor oil, occasionally leak out from the sea-water having acted on the soldering of the cases and sometimes having corroded the tin plate itself.

A fire occurring in a ship will account for excessive leakage both from casks and tins, though it may not have touched them itself.

### *Oil Damage.*

Among consequential damages must be placed the damage done to goods by oil, by tar, and by bilge-water, no one of which ought to have had any proximity to dry goods. It may happen from want of proper stowage and dunnage; but it may also happen from sea-perils, from there being so great a leak that oil and tar, which may have escaped and found their way to the bottom of the vessel, may have been upborne by the water in the ship and deposited on the goods, which may nevertheless have been properly stowed. If an interval elapse before the goods are discharged and inspected, the only traces that remain on the goods may be those of tar or oil, and it would require the master to explain the circumstances by which the tar, the oil, or the bilge-water were thrown and left on the goods, in order to relieve the ship from consequences. And I am informed the effects of concussion, stranding, and heaving down of ships by seas are extraordinary, and such,

\* *Crofts v. Marshall*. Arnould, p. 75.

in some cases, as would be deemed incredible were it not for contrary proofs being exhibited. Goods which were placed at the bottom of the ship have been tossed up to the top; bars of iron shifted from a longitudinal position to a transverse one, &c. A case has lately occurred in which tar damage resulted from a stroke of a sea having given the ship such a shock that the tar-cask, which was in its proper place in the fore-castle, was thrown to a distance and emptied, and the tar made its way to the cargo and injured it.

*Fresh Water.*

Liability for small damage to goods is not confined to sea-water as a cause. Damage occurring in rivers by fresh water is equally claimable. It is not likely to create so much injury as salt water, and it is not so easy of detection. Sea-water damage is commonly tested by the tongue.

*Water thrown down the Hold.*

I have already spoken of water thrown down the hold during a fire, and I gave the impression that the deteriorating effects of it ought to be made General Average. But as up to the present time it has been rejected from that head and been held by the underwriters to be claimable separately on the underwriters on goods, I introduce it here.

*Excess of damage on Tobacco.*

In all species of goods, with one exception, the loss, whatever it may be, is paid by the underwriters if it amounts to the required limit of damage. The

warranty is destroyed and the underwriter becomes liable. The excepted case is tobacco, in casks, from America. On this interest the policies, I believe invariably, contain the following clause:—"In case of Particular Average to pay the excess of 5 per cent. on the value of ten hhds." This limitation arose from the special circumstances under which tobacco is shipped in Virginia and elsewhere. The casks, which are large, are rolled down, often from a considerable distance, to the shipping-place over roads that are frequently wet and bad. So that a certain degree of damage to the outside part of the contents of the cask is expected, whether the tobacco meet with sea-perils or not. It is calculated to be on the Average 5 per cent. Any sea-damage supervening on this is to be paid. When the casks are in the warehouse the contents are taken out, and the outside of the mass is cut off with hatchets and burnt or exported.

*Estimates of Damage and Compromises.*

The agents of Lloyd's in foreign countries are empowered to use a certain discretion when their superintendence is requested in cases of damage. If it appears to them that the advantage gained by a sale by public auction is more than counterbalanced by the expenses attendant on it,—and in many places these are very high,—they are at liberty to cause an estimate to be made, by brokers or merchants conversant with the species of goods in question, of what the value of the damaged merchandise would have been in a sound state, and what it is worth in its

actual condition; or, what amounts to the same thing, the computed difference which the damage has caused in value. If the Lloyd's agent feels satisfied with the fairness of the estimates, he agrees with the merchants that the sale shall be dispensed with, and that the estimated result shall stand in lieu of it. It is a mistaken notion to suppose that this arrangement *binds* the underwriters arbitrarily to pay the difference in price, whatever it may be, without reference to the ordinary conditions of the policy. It does not do so. The Average is still subject to the same manner of treatment as if the goods had been sold; the advantage gained being the prevention of a heavier loss which often attends the forcing goods on a market by auction; and the pretermission of the sale charges, which in some places are excessively high.

*Cotton picked and made Merchantable.*

An exception has latterly been made in favour of the article of cotton-wool, of which such vast quantities are received at Liverpool. By a little extra labour in mending the damaged bales, and putting them into merchantable condition by picking off the portions actually wet or discoloured by sea-damage, so beneficial an effect is produced and so great a saving is effected that underwriters, with a view of encouraging this economic method of treatment, have tacitly agreed very generally to put the cotton thus conditioned in a more advantageous position than the bales which are sold damaged in the ordinary way. While they still apply the ratio of loss to the insured

value, they admit all the loss on the pickings, without requiring that it should amount to any particular percentage. This is done, as I have stated, expressly to encourage a manner of treatment by which much saving is effected.

*The Warranted Percentages.*

According to their susceptibility of damage, all goods have been divided into classes which are enumerated in the memorandum at the foot of the policy, and a greater quantum of damage is necessary to establish a claim on one sort than on another. And if from local or temporary circumstances any kind of merchandise is out of favour with underwriters, a written clause is put into the policy either excepting such goods altogether from claims, or putting on such a percentage for the limit as they consider will sufficiently protect themselves. And there are even some descriptions of goods so notorious for their liability to get damaged that, even without a written memorandum, underwriters would consider themselves not bound to admit them under the general term of "goods," unless specially informed that they formed part of the interest insured. Among the worst of these interests are wool-bags, blankets, and Turkey-red yarn. Coals, too, are objected to very often on account of their weight and their liability to spontaneous combustion. Corn, fish, salt, fruit, flour and seed are warranted free from Average, unless general, or the ship be stranded. In some policies the exception runs "stranded, sunk or burnt." There is not

much real distinction; for if a ship sink in deep water it is a total loss; and if she sink in shallow water, and rest on the bottom, that is a stranding. And as to fire, if the damage is only partial I do not consider that underwriters would hold themselves bound to pay for the damage unless it amounted to the respective percentage; and if the conflagration produced total destruction no question would arise.

The two terms corn and seed include all cereal produce except rice,—(on which Average is claimable if it amounts to 3 per cent.) If, however, any exotic seeds come exclusively under the name of drugs, and not of grain or seeds, they will pay Average when the damage amounts to 3 per cent. Grain and seeds which have been put through any manufacturing process by which the power of germination is destroyed are no longer looked upon as the “corn and seed” of the warranty. So pearl-barley would pay Particular Average in case of damage. Spices in the form of seeds are not excluded from Average. The most universal test as to the liability of such goods to Average is whether the power of germination exists or is destroyed. If it exist, as it does in barley, the grain is warranted free. If it have been destroyed, as it has in malt, the goods are liable to Average. Oil-cake, though not enumerated in the warranty, is always considered an article free from Average. In the policy of the London Assurance Company rice is excluded from Average specifically. The fish includes salted and dried fish as well as fresh. It includes cured or red herrings, but

not anchovies, which, under the name of "oilman's stores," are subject to Average.

The salt mentioned does not include saltpetre, but the inclusion of the latter is stipulated in the policy of the London Assurance Company. The term salt is used in the ordinary and not the scientific sense. Neutral and other chemical salts are not included in the term. Soda, potash, &c., pay average.

Flour includes meal of barley, &c., but not sago flour, with which it has nothing in common except in being pulverized. The latter is sago reduced to powder, and does not proceed from any grain.

Sugar, tobacco, hemp, flax, hides and skins are warranted free from Average under five pounds per cent. Sugar includes molasses. It embraces saccharine productions from other plants besides the cane; as maple sugar, beet-root sugar, &c.

Hemp and flax do not include jute, a fibrous material rather lately introduced. It is very similar to hemp and flax, and is quite as susceptible of damage.

Though hides are warranted to pay Average if the damage amount to 5 per cent., yet they are almost excluded by the use of a form of words of very frequent introduction in policies, called the Hide Clause. This provides for a certain charge being paid by the underwriters for washing and cleaning the hides instead of paying the loss on their sale. But as the charge is only claimable under particular conditions which are rather complex, it is almost tantamount to the exclusion of hides from Average.

All other goods pay Average when it amounts to

3 per cent. and upwards ; but special agreements can be made in reference to all goods, altering the customary percentage in the warranty or entirely shutting them out from payment of Average. In the latter case underwriters charge a less premium ; for experience has sometimes shown that as great an amount of claims arises on policies in respect of Average losses as of Total losses.

*India Policies.*

In policies effected in the East Indies and payable in this country there are several distinctions. By their warranty no article is totally excluded from Particular Average, but they raise their limits, and the generality of them have 10 per cent. for the more hazardous goods, and 5 per cent. for the remainder. Some of them contain no exception in favour of standing, and they enumerate several kinds of produce not in our policy, but which are staples in India. They class saltpetre with salt. Some exclude all damage to metals and loss of liquids. They also except damage arising from gales, &c., during certain seasons and in certain regions. And the majority of the Indian companies contain a proviso that 2 per cent. shall be deducted from the amount of the claim in settling it ; the effect being, in case of loss, to raise the rate of premium by 2 per cent. on the sum insured above what it professes to be.

The stipulation for deducting 2 per cent. from claims for loss and Particular Average appears to have been customary, in former times, in English



policies. It remains a part of the conditions of most East India and China insurances. When the effect of this abatement is examined it will be seen to be *a bet on the transaction*. For, whereas if the matter insured arrives without claim for loss or damage, then only the agreed premium (which for illustration we will call  $2\frac{1}{2}$  per cent.) is received. Should the adventure, however, turn out a total loss, then by this arrangement the premium becomes  $4\frac{1}{2}$  per cent., instead of  $2\frac{1}{2}$ ; *i. e.* original premium  $2\frac{1}{2}$  per cent., *plus* 2 per cent. contingent premium. On all claims for loss, &c., less than total the effect will be similar in its relative proportion.

It has often occurred to me that where a proposer and an underwriter differ very much in their estimate of a proposed risk, an arrangement tantamount to this might be made. The underwriter might say to the broker or merchant, "You are very sanguine as to the goodness of this ship and the safe arrival of these goods; I differ from you and consider the risk requires 5 per cent. to cover it. However, should the result prove my estimate to be wrong, and no claim arises on this policy, I agree to return you 2 per cent. (or any stated proportion) of the premium." The same principle is involved in stipulating for a certain abatement from claims.

#### *Goods in Bulk.*

I have already spoken of the permission granted to the assured by the introduction of the Average clause in the policy of subdividing the cargo or the species

of goods insured into parcels, or series of a definite number of packages, in order to render the insurance more effectual. By this means a much smaller quantity of damage becomes recoverable than if it were necessary to establish an amount of 3 or 5 per cent. on the whole of the cargo or interest. And on manufactured goods, and some valuable species of produce, instead of a series, each single package is allowed, in general, to stand by itself, and if the damage amount to the appropriate percentage for that kind of goods on the separate package it is claimable from the underwriters. In India and China policies this permission is very frequently expressed in a monetary amount, thus; "to pay Average on each 2,000 rupees value," or "each value of 250 dollars." And this method has the advantage of giving a certain uniformity of value to series. In English policies, and in some India ones, the words are taken to imply that the terminal series, although only a broken number, is also to reckon like a full series, which is a farther advantage to the assured of great importance; because by the system of dock management the damaged packages are usually returned as falling at the end of each mark, consequently in a majority of cases in this broken or terminal series. It is not by coincidence this happens, but because as the goods are landed the damaged packages are set aside and collected into one lot at the end of the sound portion. Although this arrangement is perfectly known, and underwriters understand that the heaping the damaged packages together into the final series, or the two or three last

series, is a voluntary act, it has its advantages. It concentrates the damage, it is true, and frequently causes the establishment of a claim which would have fallen to the ground had the damaged packages been scattered through the parcel in the natural order in which they were taken out of the ship's hold ; but, on the other hand, this segregation of the damaged from the sound prevents a more general depreciation, which would happen if in every pile there were a portion of damaged packages, lowering the value throughout the shipment. For hemp, flax and tow, which are often so loosely packed in bundles as scarcely to be distinguishable, the clause sometimes reads, "to pay Average on each five tons as landed," or "on each ten tons as they rise from the hold."

But in all other cases of goods in bulk the Average must be paid on the whole quantity ; no subdivision is permitted. Goods, however, in bulk are either from their nature "free of Average," as corn, fish and salt, or they are of comparatively small value as against goods in packages, for they consist of wood, coals, sulphur, stone, clay, &c. ; the most valuable being a cargo of iron, or of the ores of iron and copper. A stranding destroys the warranty and puts them all on a level as to claim, the damage being then recoverable from the underwriters whether it be large or small ; whether it had been declared altogether free from Particular Average, or subject only to average in case the damage amounted to 3 or 5 or 10 per cent., except by the policies of the East Indian Assurance Companies.

*Of Extra Charges on Damaged Goods.*

Besides the loss in the value of the goods themselves when injured by sea-water, &c., such damage very frequently gives rise to charges which would not have been incurred in the ordinary course. These extra charges differ in amount and number in various places. They appear to be fewest and lowest in amount in London; they are more in number in Scotland than in England: and abroad there are many places where the charges rise so high that they become a very serious tax in all cases of damaged goods sold.

Extra charges consist of expenses of and about inspection or, as it is commonly called, survey: preserving and conditioning goods so as to prevent further loss or to reduce the existing deterioration; public sale expenses; charges of Lloyd's agents; and expenses of documentation.

Here, in London, there are rarely any other charges than what arise in the dock warehouses, viz. the shifting of partially-damaged packages into others, and the providing new packages for those which are broken and decayed. Goods in London are almost universally managed by brokers, who seldom make any charge for surveys and certificates;—the articles on which surveys are paid for are wood-goods and tobacco and, sometimes, wool and silk. It is so generally the custom to sell goods by auction that no extra charges arise in respect of public sales; and no legal or notarial documents are required.

It is a curious circumstance that the Scotch, distin-

guished as they are by clear views and strong common sense in their commercial pursuits, should have fallen into the system of submitting to be fettered with legal proceedings and documents in cases of damage to goods, which a reference to transactions of the same kind in England abundantly shows to be unnecessary. Petitions, warrants, reports, all legally drawn, are gone through in cases of damage. A protest, there and here, is a valuable document as setting forth in a clear manner an account of the transactions and disasters of the voyage : but as that is generally provided by the ship for the owner's own protection against claims on damaged goods, it does not form an extra charge on the merchandise damaged. Then, in Scotland, there are roup expenses, bell-man, "the tuck of drum," &c., in a rather long list, but in general not amounting to any large sum on the whole.

In English colonies and in foreign countries extra charges are more numerous, and sometimes excessive in amount. There are formalities before the Tribunal of Commerce, formalities of Port Wardens, formalities of Lloyd's agents, formalities of British Consuls and Vice-Consuls. There are charges for merchants who inspect the goods, coopers who open the packages for inspection, workmen who close them up again, brokers who estimate their value. The government has an auction tax, and the poor receive a fractional impost (generally the smallest charge of the whole). Then there are advertisements in public papers, and handbills printed, posted and distributed. There is the hire of the auction room and of the sampling

apartment. There is the auctioneer's commission, and carriage of the goods to auction. There are criers, trumpeters and bason-beaters. Sometimes a full copy of the protest accompanies every set of papers by the same ship, if there be fifty issued : and finally there are duplicates of documents and post-ages. Even now I have not enumerated every form of charge. I do not intend to say that all are included in every place ; but I think, considering that the process of dealing with damaged goods is gone through as frequently in London as in other places, and that it may be said with truth that claims are more moderate here than they are abroad, it is plain that these extra charges are for the most part useless, and have no effect in reducing the number or the amount of claims against underwriters, which they so formally and solemnly avouch.

*Charges paid by the Buyers.*

But perhaps there is no sort of charges more objectionable and more mischievous than those concealed ones, the charges paid by purchasers of goods at auction. When I seek for any legitimate reason for them, any advantage gained from them, I find none ; and I am led to fear that it is a system pursued in some places purposely to increase the claim on the underwriters. The action of it will be obvious when described. For instance : In St. Petersburg it was found some time ago that the purchasers at public sales had to pay 4 per cent. of sale charges : and of this sum no mention was made in the account

sales. In Leghorn  $2\frac{1}{2}$  per cent. is payable by buyers, and at Antwerp rather more than  $1\frac{1}{2}$  per cent. In the two latter places, however, these conditions are openly stated in the papers, and therefore can be dealt with in adjusting claims. But take the case of Russia,—and there may be other places in which the same plan is pursued and we remain ignorant of it:—A buyer knowing he has to pay 4 per cent. charges on the goods which he purchases will of course give so much less in purchase-money: he will give only 96 per cent. of the value he puts on the goods: for when he has paid, besides, 4 per cent. of charges he has given the value at which he estimates them. No blame, therefore, attaches to the buyer. But the following effect is produced in the claim on the policy. In the first place it is to be premised that charges follow the claim for deterioration: if this falls to the ground the charges are not claimable from the underwriters: if only part of the damage becomes claimable a proportionate part only of the charges attaches to them also. There are, consequently, two motives for making the primary claim (that for deterioration) as high as possible; first, for its own absolute result; and secondly, for the sake of bringing in as large a part of the charges as possible, since they are governed by the amount of deterioration. Two instances will exemplify this clearly.

Let the sound value of goods be . . .	£102
Let the value in damaged state be . .	£100
Then, as the purchaser has to pay 4 per cent. of charges, he will give less . .	4
	<hr/>
	or £96
The difference is . . .	<hr/> £6

or 5·882 per cent. deterioration.

And thus having established a sufficient deterioration to make underwriters liable, it draws in all the charges with it. And, even, should the above 4 per cent. be deducted from the amount of charges, the arrangement is still very beneficial to the merchant, for he recovers the damage on the goods and the balance of charges, neither of which he would be able to claim if the following compensating method adopted by Adjusters in such cases be pursued.

Let the sound value of goods be . . .	£102
Let the sum paid the auctioneer in money, be . . .	£96
To this the Adjuster adds the other pay- ment which the purchaser makes to somebody for charges, and which com- pletes the value, viz. . . .	4
	<hr/>
Together . . .	£100
Difference . . .	<hr/> £2

or a fraction under 2 per cent. of deterioration, which is not claimable from the underwriters, and consequently the accessory expenses called extra charges are not claimable either.

To the purchaser it is plainly indifferent whether he pay 100 per cent., that is, the entire value he sets



on the goods, in one sum to the auctioneer; or whether he pay 96 per cent. of that value to the auctioneer and 4 per cent. to some other proper person. It is a mere matter of arrangement, but one that has a very decided effect upon the underwriters by manufacturing a claim which would otherwise not exist.

At Leghorn and at Antwerp, where a similar arrangement is made, there is not the same objection, because the condition of sale is openly stated in the papers; but the same method of dealing with the charges is pursued in adjusting the claims at these last-mentioned places as at St. Petersburg. I have observed a case, at Rotterdam, where the charges to be paid by the purchasers were as high as 10 per cent.

At Calcutta an objectionable practice has been brought to light within the last few years; one of the same description, but not having exactly the same doubly mischievous effect. The auctioneers at Calcutta very commonly charge the immense brokerage on sales of 8 per cent.; but they privately return 2 per cent. to the merchant. Whilst this remained unknown in England it was a dishonest action to continue the practice; and now that it is known here it is a foolish and useless thing to perpetuate an arrangement which is always rectified by the Adjuster in making up the claim.

In fact, all covert arrangements of this character in trade are either a useless encumbrance or else they are worse and have a sinister intention. Open and

above-board dealings we have invariably seen to be most saving in the long run as they are most satisfactory at all times. These remarks are not levelled at individuals who pursue a practice which they find already established,—but against a system. Whoever breaks through a pernicious custom, “more honoured in the breach than in the observance,” is a courageous man. He is, in his line, a hero in some such sense as the soldier is a hero who effects a breach in the enemy’s wall.

The specific charges consequent on goods being sold damaged sometimes obviates some ordinary charges; when this is the case the extra charges are to be reduced by the amount of such saving. Thus by selling for cash at auction an ordinary guarantee commission is sometimes got rid of. And many merchants make a difference in their own commission as consignees when goods have been sent to auction, because they have been spared some of that trouble for which the ordinary rate of mercantile commission was a recompence. I must add, however, that a reduced commission is by no means an invariable consequence of selling goods through an auctioneer.

## COMPARATIVE TABLE OF THE WARRANTY OR MEMORANDUM IN SEVERAL POLICIES OF INSURANCE.

## LONDON POLICIES.

*Excluded from Average, unless Stranded.*

Lloyd's Policy . . . . .	Corn, Fish, Salt, Fruit, Flour, Seed.
Royal Exchange Assurance Co. do. . . . .	Corn, Fish, Salt, Fruit, Flour, Seed.
London Assurance Co. do. . . . .	Corn, Fish, Salt, Fruit, Flour, Seeds, Saltpetre.
Indemnity do. . . . .	Corn, Fish, Salt, Fruit, Flour, Seed.
Alliance do. . . . .	Corn, Fish, Salt, Fruit, Flour, Seed.
Marine do. . . . .	Corn, Fish, Salt, Fruit, Flour, Seed.
Eastern Marine do. (London Branch) . . . . .	Corn, Fish, Salt, Fruit, Flour, Seeds.

*Excluded from Average under 5 per cent., unless Stranded.*

Lloyd's Policy . . . . .	Sugar, Tobacco, Hemp, Flax, Hides, Skins.	} And all other goods not enumerated under 8 per cent., unless Stranded.
Royal Exchange Assurance Co. do. . . . .	Sugar, Tobacco, Hemp, Flax, Hides, Skins, Rum.	
London Assurance Company do. . . . .	Sugar, Tobacco, Hemp, Flax, Hides, Skins, Rum, Rice.	
Indemnity do. . . . .	Sugar, Tobacco, Hemp, Flax, Hides, Skins.	
Alliance do. . . . .	Sugar, Tobacco, Hemp, Flax, Hides, Skins.	
Marine do. . . . .	Sugar, Tobacco, Hemp, Flax, Hides, Skins.	
Eastern Marine do. (London Branch) . . . . .	Sugar, Tobacco, Hemp, Flax, Hides, Skins, Saltpetre, Jagry,*	

\* Metals free from Particular Average. No liability for leakage or breakage of or to any liquid, or liquid's package.

## INDIA POLICIES.

*Excluded from Average under 10 per cent.*

CALCUTTA.		
Equitable Insurance Co. of Calcutta ..	Salt, Saltpetre, Sugar, Jagrr, Rice, Corn, Flour, Seeds, Wheat, Gram, all other Grains, Tobacco, Hides, Ghee, Spirits and other Liquors	(a) (c) (d)
Tricon do. do. ..	Salt, Saltpetre, Sugar, Jagrr, Rice, Corn, Seed,	(c) (A)
Canlon do. Office (Calcutta Branch)	Salt, Saltpetre, Sugar, Jagrr, Rice, Corn, Seed,	(c) (A)
Balance Ins. do. do.	Salt, Saltpetre, Sugar, Jagrr, Rice, Corn, Flour, Seeds,	(c) (A) (g)
Calcutta Mercantile Marine Ins. Co. ..	Sugar, Jagrr, Rice, Corn, Flour, Seed, Grain, Tobacco, Hides, Ghee, Skins, Alum, Spirits, and other Liquors	(c) (c) (g) (f)

***Under 10 per cent.***

[illegible]

***Under 15 per cent., unless Stranded.***

[illegible]

(a) With exception of leakage of Rum and Oil from any cause.

(b) All other goods free under 5 per cent., unless stranded.

(c) All other goods free under 5 per cent.

(d) All other goods with ship and freight free under 3 per cent., Ships Provisions free, unless stranded.

(c) Freight and Provisions of all kinds under 5 per cent.

**All Metals free from Particular Average.**

(c) Not liable for loss from leakage or breakage of or to any Liquid or Liquid Package.

(A) Provisions of all kinds under 5 per cent.

(i) Vessel and Freight free under 5 per cent., unless stranded.

OF PARTIAL LOSS OF FREIGHT; SOMETIMES CALLED  
PARTICULAR AVERAGE ON FREIGHT.

The freight of goods (which Lord Bacon alludes to when he speaks of vecture or vection,) is the ship-owner's payment for carrying another person's goods in his vessel; or it is the hire of his ship itself when it is let as a chattel to another person for a given sum or at a given rate. In the one case the ship-owner is a carrier; in the other he may be called a landlord, by the same anomalous manner of expression under which we call the possessor of a mere house a landlord. His profit or hire is an insurable interest. It is insurable so long as it is at stake. If he receives it before the ship's sailing it would be mere waste of the premiums to insure what is already certain. If he is to receive freight from the shipper whether the vessel complete her voyage or not, it would only be insurable from a doubt of the shipper's ability to pay apart from the goods themselves should they be lost. An owner may feel satisfied as long as goods remain in his possession as a material guarantee for the freight of them, or while he has the power to stop them immediately after he has completed his part of the mutual agreement by delivering them out of his ship; but he may not have the same confidence in the solvency of the shipper, especially if that shipper's venture be lost.

It is quite plain then that freight is a thing that may be at risk,—the safety of it be endangered like other interests: and, moreover, as its existence de-

pende on the right delivery of the goods, its fate is very much involved in theirs. It is so tied to the goods that it may be said to sympathize in what concerns their safety and right direction.

Freight, therefore, when at risk is a thing insurable by the shipowner; and when it has been paid in advance it becomes, as it were, latent in the goods; it becomes a part of them, and so is insurable by the shipper of goods under the increased value of the merchandise owing to the pre-payment of the freight; or he may insure the advance separately.

With regard to interest in freight on policies, it has been treated in a more liberal manner than any other subject of insurance. In all other insurable interests the true value, with a little margin for profit, is the extent of insurability. But with freight a sum is allowed to be covered larger than can ever be realised by the safe arrival of the ship at her destination. The gross amount may be insured—but the gross amount can in no case be secured by a vessel completing her voyage. Directly a charter is made, the freight, the subject of that charter, begins to melt away by ordinary means. First there is the commission for procuring freight: then port charges whilst in harbour. Directly the ship sails come lights, pilotage, &c. From the first day the crew arrive on board their wages commence and continue day by day to lessen the freight in an ordinary or natural manner. The expenses of taking in and landing the cargo are often at the ship's charge; and there must be dunnage provided, and frequently ballast. It is true that the

stores and provisions are considered part of the ship, and therefore are not allowed to be taken into consideration in estimating what the net freight would be; nevertheless, in the owner's mind, they generally go down as an item against his profit by freight. It is clearly impossible that a ship can ever save her whole freight under the most favourable circumstances. It is more likely that she will never realise above half of it; and it frequently happens that by adverse winds, bad sailing powers and the like, the whole freight is consumed in expenses without any accident or peril of the seas supervening. So that it is clear, in any case, (speaking of a single voyage,) when an owner is fully insured for his freight, the loss of his ship at any point, even at the very outset of the voyage, is better for him than her safe arrival. The policy will always in such a case give him more than a completed voyage. This is very contrary to the regulations relating to interest in other subjects of insurance. Looking to net results, a man may insure more than he can ever at the best of times receive if he be uninsured: but discarding the notion of profit, and regarding the actual freight an owner is to receive if his vessel arrive safely at her destination, it will be seen to be quite just that he should be able to protect himself to the extent of the entire sum contingent on the completion or non-completion of the voyage.

It may, however, seem an anomaly that whilst all the incidental and absolutely certain expenses of the voyage are to have no effect in reducing an owner's

insurable interest, they are to give him the fullest assistance in reducing the amount on which he contributes in respect of his freight in case of General Average. The freight is to be diminished by every one of the expenses named, with the exception of victuals; and so the contributing value of freight is generally insignificant in comparison with that of the ship and the cargo. The hardship of this lies on the ship and cargo, because they contribute as much more in proportion as the freight contributes less. To the underwriters on freight it is a great relief, as they never are called upon to contribute on the amount which *they* really have at risk. For *their* risk always continues the same, viz. the sum insured. At whatever part of the voyage the ship might be lost they must pay a total loss to the extent of the whole policy: therefore any remedial or preventive measures that are influential in saving the ship, go to the extent of saving the whole of the insurance on freight; and the commonest reasoning will show that in conformity with the equitable regulations for the contributions of the other interests, a payment towards a benefit received must be on the amount which was benefited, and that freight ought not to be an exception. The newness of this view does not prove anything against its correctness and truth.

Freight is warranted by the memorandum free from Average under three pounds per cent., unless general or the ship be stranded. In this it resembles the ship itself and merchandise, except the twelve articles specified by name in the policy. No claim can arise on



freight which arrives from deterioration of the quality of the goods with which it is connected, but only for a loss in quantity, if they reach their place of destination. That loss must amount to 3 per cent. on the whole interest in freight, for it admits of no subdivision. To ascertain the loss, it is usual to find the average weight of the sound portion of each species of goods on board; or, if the same species is further distinguished in itself by different-sized packages, &c., then a comparison must be made between the sound and damaged parts of each plantation mark or other division of that interest. The average sound weight being thus obtained, the quantity lost is ascertained by a comparison of the actual out-turn of the cargo with what should have been the result had the cargo arrived without damage. The loss has then to be applied to the insured value in the same way in which damage to goods is treated.

Policies on freight are frequently left open, that is, unvalued, owing to the uncertainty which often exists as to what quantity of goods the ship may procure and what she may deliver; for freights hitherward are nearly always payable on the quantity delivered. To find, therefore, what the exact interest on an open freight policy is, is a material condition precedent in making a claim. The formula will be the quantity delivered + the quantity deficient, + premium of insurance, and charges of recovery. The system of finding in one operation the premium on premium, and so on *ad infinitum*, is called *covering* the interest.

The interest on a freight policy has its inception,

that is in plain English, begins, when a ship commences taking in her cargo. Should the vessel be lost during the process, even when she has only the minor part of her lading on board, the underwriters would be liable for a loss on the whole sum insured.

If goods are sold at an intermediate port on account of damage, the loss of the freight should fall on the freight policy, in the same way that the loss on the goods falls on the policy on goods. It was formerly the practice to pay the entire freight to the captain out of the proceeds of damaged goods sold if they were sufficient, but now the principle has become recognised that freight is susceptible of loss in itself by the circumstances and perils which affect goods; a recognition which gets rid of a great difficulty in making a proper settlement between two interests. Freight differs from other interests in that it is the only one which is capable of being restored by any act after a loss. If goods are necessarily sold for damage in an intermediate port the captain may fill up the ship with fresh goods, and thus prevent loss in respect of freight. He is not bound to do this, but it is a very proper course to take whenever practicable.

*Advance of Freight insurable, &c.*

We mentioned, above, that advances on account of freight may be insured *eo nomine*, and are good interest. It was held till lately that any advance which was repayable out of freight could not be legally insured. But by the case of *Hall v. Janson* tried in 1855 in the Queen's Bench, it was decided that

money advanced to the assured as owner of the ship, on account of the cargo loaded on board, was an assurance on freight, and liable to General Average. And moreover it was also ruled that a custom alleged to exist in London, where the policy was effected, that assurers of money advanced on freight were not liable to make good a General Average loss, was no answer to such a policy which, according to the previous interpretation, expressly stipulated that the assurer should be liable.

## PART THE FOURTH.

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### OF TOTAL LOSS.

#### *Definition.*

The Total Loss of ship or goods means the total loss of them to their rightful owners, or, when insured, to the underwriters upon them. It is not necessary that the ship or her cargo be annihilated to establish a Total Loss. It suffices that through some peril insured against they are removed from the control and possession of their rightful owners. Therefore if the ship be run away with by the captain and his crew, or be captured by enemies or seized by pirates, there may be a total loss to underwriters, although that vessel is really floating over the waters in as efficient a state as she ever was.

#### *Foundering and Fire.*

Nevertheless, the first ideas that present themselves to the mind when we hear of a ship being totally lost in common parlance are the destruction of a vessel by a violent accident, as when she founders in a storm, is dashed to atoms on rocks, perishes by conflagration, or else by the more insidious consequences of leaks which at last cause her to sink and disappear. When

evidence can be procured of the loss of a ship or her cargo in either of these ways it is obvious that a settlement for total loss with the underwriters easily follows. It is a notorious fact that a claim for total loss is paid more readily, and apparently more cheerfully, by the underwriters than any Average; although one comes to an irresistible conclusion that many vessels perish from what may be called natural causes, that is by inherent defects, insufficiency of strength, or overlading. But the record perishes with them. The waves which close over the sunken vessel effectually put further proof out of the question. Underwriters feel that to attempt to resist payment on the score of previous unseaworthiness is hopeless; and so, according to a mental tendency perfectly understood, men submit themselves without struggling to what they take to be inevitable, and write off a Total Loss with a good grace when they would fight hard to reduce a claim for Average by a few shillings per cent.

*Missing Ships.*

But sometimes no proof whatever is obtainable of the loss of a ship. She sails and is never heard of. A fear gradually grows into a conviction that she is lost, until a sufficient moral certainty is produced in people's minds to authorize the assured to ask payment from the underwriters as for a total loss. Before doing this a sufficient time is allowed to elapse, differing according to the voyage, to allow any possible information to arrive should the ship be still in existence. So ramified is the system of Lloyd's

agency that there is hardly any part of the world from which intelligence is not procurable concerning shipping. From the central office of Lloyd's Secretary in London the eyes of those appointed to direct its very perfect mechanism sweep all the oceans, as the observation of the watchful astronomer traverses the heavens at night to discover a new comet or the disappearance of a star. The large volumes kept at Lloyd's called the Index Book afford an easy reference to the known history of all English and many foreign ships, so that the places and dates of their various courses can be traced. The press lends its aid, and private correspondence brings in its quota of information, and government despatches complete the means of watching the enormous amount of property floating on the waters.

The length of time during which no tidings are received of absent ships and which is considered pretty conclusive of their loss is not invariably the same at all seasons of the year or among all persons. But as an approximation it may be said that two months for our neighbouring seas, three for the Mediterranean, four for the Atlantic, six for the Indian Ocean, and something more for the Pacific, during which periods nothing is heard of a ship, are the lengths of time which must intervene before a claim can be made on the underwriters for total loss on a missing vessel. And in paying under such circumstances some insurers require an undertaking from the assured that the loss shall be cancelled should the ship afterwards come to hand. But, in truth, it does

not require an indemnity of this kind in case of the reappearance of the missing property ; for any settlement on a policy clearly obtained in error or by fraud is not binding and can be recalled. Yet as an unconditional settlement of a loss is not a desirable thing to disturb, it was laid down in *Houstman v. Thornton* that "if after the underwriters have paid as upon a lost ship she reappears, she will be treated as abandoned and belonging to them." This was in the case of a ship not heard of.\*

#### OF ABANDONMENT.

There are some words and some significant acts used in men's dealings with each other which, from antiquity and convention, pass current for a higher value than their intrinsic worth. The particular circumstances which gave them birth may have changed or passed away, but the expression or the action claims a prescriptive right to appear ; and at last people are afraid to omit it, lest they should in some unforeseen manner be damnified by so doing. A father of the English law says that no deed of conveyance can be complete unless it contains the words "to have and to hold." Persons signing and sealing documents are careful to murmur "this is my act and deed." The giving of the ring in marriage, of a peppercorn annually as the tenure of some leases, and a hundred such time-honoured ceremonies, will rise to the reader's mind as instances of conven-

\* Maude and Pollock, p. 230.

tional forms in civil, legal and commercial transactions. "The emphatic word in the law-merchant, Abandonment," as Lord Ellenborough grandiloquently expressed it, is one of those things the importance of which is perhaps over-estimated. It has its uses and its force, as we shall see; but we shall also see that the using it will not establish rights which do not exist, nor the disuse of it defeat a vested right really in being. I shall have to show the particular cases in which it is useful and intelligible as a compliance with a condition precedent. In this it resembles the noting of protest by a captain within twenty-four hours of reaching a port. The notation itself is a dry and unexplanatory form; yet if omitted, the detailed statement of the voyage called the extension of protest cannot be afterwards made by a notary.

It was in the time of war that acts of abandonment were of the greatest concern; when captures and recaptures of vessels were constantly occurring, and there was a particular necessity for some formal recognition of the vesting and divesting of ownership in property which was liable to such frequent casualties and changes. In our more peaceful times, its true and nearly only value is discovered in those cases called constructive total loss either of ship, cargo or freight. Incidentally it has still its uses and significance, though I think they are smaller now than is commonly supposed.

I propose to consider the subject under the three following heads; viz.—



The Effect of Abandonment.  
 The Right to Abandon, and,  
 The Method of Abandoning.

I am unable to prevent this from being a somewhat legal and technical part of my general subject, but I shall endeavour to dress the matter in the simplest form possible. I must premise that legal writers on abandonment have always reference to *an action brought on the policy*; and they treat it in relation to its effect on subsequent proceedings. I need not say, however, that at Lloyd's and at insurance offices abandonment does not necessarily lead to litigation; and that therefore many of the positions taken by jurists are inapplicable to the current method of business between underwriters and the assured.

*Effect of Abandonment.*

Abandonment is recognised by the laws of all nations. It is the cession and giving up of all right present and future in the thing lost, and the transference of all property and rights to the underwriter, so that they pass to him.\* Abandonment can be accepted or refused by the underwriter. It is generally refused by him, because admission of the abandonment places him in a somewhat different position with the assured, and he generally wishes to

\* On acceptance of abandonment, the underwriters' title dates back to the time of the loss, and has relation to the *status in quo* at that time, although the *status* may subsequently have become altered. (*Cammell v. Sewell*, Exchequer, July, 1858.) I may mention incidentally that this case supports the authority of the *lex loci* over English parties coming within its action.

avoid any accession of responsibility, particularly as abandonments are frequently made when facts relating to the loss of the ship and goods are very imperfectly known. But after all, the merits of the case are decisive for or against an underwriter. If he accept abandonment, and it afterwards turn out that the facts upon which it was made were untrue or did not exist, the abandonment is nothing, does not bind in any way, has no effect. On the other hand, although the underwriter refuse acceptance of abandonment, yet if there were valid grounds for ceding the property to him the notice given him will be sufficient; and in many cases where the loss is such that no question can arise upon it the notice itself is unnecessary, and the loss can be claimed without it. "The great convenience of making an abandonment," says Park, "has led to an opinion that it is more necessary than it really is. A party is not in any case obliged to abandon; neither will a want of abandonment oust him of his claim for that which is an Average or total loss, as the case may be. When there is an abandonment, the risk is thrown upon the underwriter: when there is no abandonment, the party takes the chance of recovering according to his actual loss." When there is a total destruction of the thing, abandonment is unnecessary. If the loss is so absolute as to be beyond all question, abandonment has little real effect, and the want of it little prejudice. It is in doubtful and questionable cases where it is of importance. But even in these a simple act of abandonment is not to have an independent

potency: and Lord Tenterden has shown that the nature of the thing itself is not altered by giving it any particular name. "No artificial reasoning," it was said in the case of *Pole v. Fitzgerald*, "shall be allowed to set up a Total Loss;"—that is, where it did not exist in itself. But it is useful, and has an effect in hypothetical cases. "Abandonment is only necessary," said Lord Ellenborough, "to make a constructive total loss. Where the thing subsists in specie, and there is a chance of its recovery, in order to make a total loss there must be an abandonment." And the same very eminent judge laid down that, "the true effect of a notice of abandonment is only this, that if the offer to abandon turns out to have been properly made upon the supposed facts, which turn out to be true, the assured has put himself in a condition to insist on his abandonment. But it is not enough that it was properly made upon facts supposed to exist at the time, if it turn out that circumstances existed unknown to the parties which did not entitle the assured to abandon."\* But I must add that there are contradictory opinions on the subject: and in an old case, *Hodgson v. Blakiston*, notice of abandonment was held to be necessary although the ship and cargo had been sold and converted into money when the notice of the loss was received. One great advantage of abandonment is to mark the time and procure definiteness. And Park says, the reason why notice of abandonment is deemed necessary is to prevent surprise or fraud on the underwriters.

\* In *Bainbridge v. Neilson*.

We have already seen that there are two kinds of total loss : one absolute,—as by the sinking of the ship ; the other constructive ;—that is, when the ship is swallowed up, not by the sea, but by expenses. In the first case the ship is lost ; in the latter she is *as good as lost*. For if it require me to spend as much to rescue and repair my vessel as it would do to build another of the same size and class, it is really lost to me in a monetary sense ; and in laying out that money I am, as it were, purchasing a new vessel. And if it would cost me *more* to rescue and repair, than to build a ship of the value the repaired vessel would have after repairs are completed, it is plain that I should be throwing away my money ; and underwriters cannot compel me to make such a sacrifice. I abandon my vessel because she is in an impracticable place or situation. This indeed is the case with most lost ships. Few ships are actually destroyed compared with the number that sink or are extensively injured : and no ship can be positively annihilated. Loss resolves itself into a question of degree. One vessel, for example, sinks in shallow water, and with expense and the use of proper means can be raised again ; another sinks in deeper water, and no attempt is made to raise her. The difference of one fathom in depth may perhaps thus create the distinction between a total loss and no loss at all. So the particular situation in which a ship is placed by sea-perils influences my dealings with it. I may be so attached to the vessel that I resolve to spend any money to retrieve her and put her again in repair. On the

other hand, I may find the cost of restoration greater than it becomes me prudently to undertake, and I resolve to give up all right in her to the underwriters in consideration of their paying as for a total loss. I give *notice of abandonment* to them. If they accept my notice they take to the ship and can do what they please with her;—such as she is, she is theirs. Not only the ship itself but all future use of the vessel is theirs;—so that if they succeed in getting her again to sea and making her earn freight, that freight is theirs also. But as the cession of freight to the underwriters on ship affects a third party, that is the underwriter on the freight, it will be necessary to speak on this point presently more at large. If the underwriters refuse my notice of abandonment I am left to use my own judgment in proceeding. If I am still convinced of the inutility of attempting to get the vessel out of her difficult situation, and of the excessive expense that will be required to repair her, I shall use my discretion and sell her. Then, I shall justify my proceedings with the proper proofs and shall still claim a loss from the underwriters, and shall make over to them the proceeds of the sale. The circumstance of their refusal of my abandonment will not oust me of my rights, and I still consider myself acting as their agent in selling the ship and getting home the proceeds of the sale. I have, it is true, my proper duties towards the underwriters in making an abandonment, and so getting rid of my own particular ownership and responsibility in the ship. I am not to dally and be indecisive: I must determine quickly

what I will do; because my delay terminating in a resolution to abandon, may seriously have lessened the opportunities of the abandonees to save the ship or to do the best with her. Nor must I risk the proceeds of a sale by making use of the money in any speculation, or by allowing it to remain long in agents' hands, or by adopting a circuitous means for its transmission to this country. Should I do any one of these things I should be guilty of *laches*, and should be held liable for the moneys had and received to underwriters' use.

But an abandonment may be made on mistaken grounds, under a misapprehension that the position of the ship was worse than it really turned out to have been, or from not knowing that the situation of danger was passed and the vessel was again in safety. An abandonment made on invalid grounds is without effect, and neither the underwriter nor the assured are to be bound by it. *The law does not catch men in snares, or make them pay heavy penalties for innocent mistakes.* Like some medicines, it is potent if the disease exist and require the remedy; if there prove to be no disease it is quite inoperative and harmless. So where a ship was taken and abandonment made, but was retaken and was known to be so before the action was brought, the abandonment would not have effect, because the state of things was different to the underwriter from what he supposed at the time of the abandonment. But if the matter be quite settled before the error be discovered it is not incumbent on either party to reopen the settle-

ment. So in an actual case, where after abandonment a total loss had been paid, the owner was not compelled to refund because the loss turned out to be partial, but the underwriter took the salvage himself. And where, in the morning, the underwriters virtually accepted an abandonment of a ship that had been captured, by returning the protest to the broker with the remark that "they were satisfied," which was held to be a sufficient acceptance, but, in the evening, intelligence was received that the ship had been recaptured, Lord Eldon held that they must pay as for a total loss because they had acquiesced in the abandonment. (*Smith v. Robertson.*)

I would not, however, lay much stress on this decision, because it clashes with that ingenuous spirit which should animate all transactions between man and man, and which has been shown to pervade this difficult subject of abandonment. Here it was clear that even if the expression of the underwriters amounted to an acceptance, which I must consider doubtful, the fact on which it was made was erroneous, and the ship was in safety when they believed her to be lost by capture. Had they not accepted, it is plain from what has gone before that the recapture would have nullified the act of abandonment.

Now, about freight. The books state that an abandonment of ship to the underwriters gives them the freight as an incident; *i. e.* the freight she may afterwards earn. But then, as the freight may be insured by another set of underwriters, it seems a strong thing, and, at first sight, a wrong thing, to

give the subject they have insured to the insurers of the ship. The court in two early cases manifested a disinclination to look this situation in the face. It was afterwards, in the case of *McCarthy v. Abel*, specifically discussed, yet even then it was not decided in the affirmative. Lord Ellenborough's judgment in *Sharp v. Gladstone* is given negatively and with caution. When learned judges are diffident it is not for laymen to be positive, and throw themselves open to the accusation that

"Fools rush in where angels fear to tread."

But in the trial of *Case v. Davidson* Lord Ellenborough did distinctly state that an abandonment of ship carries freight as an incident. And in the late case of the *Scottish Marine Company v. Turner*, this principle has been re-affirmed. For myself, were I an underwriter, it would require a great deal of persuasion to make me give up what remained of the freight, which I had insured, to the underwriters of ship, who had not insured it. But questions are not likely to arise often on this head, because freight stands in a somewhat different position to ship or cargo. Freight being a sort of profit is more impalpable than ship and goods. For reasons already expressed, underwriters on freight in many things are in a more favourable position than the insurers of other interests; but in respect of a loss their position is rather worse, for theirs is the only interest (except profits and commission) which is affected by the loss of the voyage. In former times the loss of the voyage was



very frequently mentioned, and was often brought in as a test of the existence of a total loss; but latterly the consideration of it has been discarded when the question relates to the ship; but it is important with freight, profits, and commissions; for in these interests the loss of the voyage is the loss of the interest itself.

The position of freight affected by an abandonment is so anomalous that I must pursue the subject a little further, at the risk of being thought tedious. We have heard, above, that the freight being an inseparable incident of the ship passes with the ship to the abandonee. We can even reconcile *this* to our minds with a little difficulty, by considering that if a *house* were made over to us we should look for all future rents derivable from it,—otherwise the assignment of the tenement would be futile. But we are now met by a more formidable obstacle to the settlement of the question, viz. that the tendency of decisions is, that not only all future freight is to pass to the underwriters on ship when abandoned, *but also what has already been virtually earned but not paid*: so that if nine-tenths of the voyage were accomplished when the vessel was abandoned, the ship underwriters were nevertheless entitled to take *the whole*. Mr. Arnould thus sums up the subject: “The result, therefore, of the English jurisprudence on this point must be taken to be, that in case of separate insurance and abandonment of ship and freight to different sets of underwriters, the underwriters on freight take nothing by the abandonment, but *the whole freight pending at the time of*

*the casualty, and ultimately earned by the ship on arrival is transferred to the abandonees of the ship as an inseparable incident thereto.\** Now if this is the case, it seems to follow that freight must cease to be a separately insurable interest, because it has, under this view, no individuality apart from the ship itself, being its "inseparable incident." It is an emanation from the ship: it is as much a part of the vessel as one of her masts is. We could not with benefit insure the mainmast of a ship when the ship is herself insured, because, in case of a sale, the underwriters on the latter would certainly claim and receive the proceeds of the mast, and leave nothing for its separate insurers. It is in this anomalous position that freight is placed, and we are in the following dilemma: If the underwriter on freight is subject to have his interest given away from him to a set of persons whom he never contemplated, but whose rights are held to be paramount to his own, then a new risk arises on a freight policy,—that of "peril of underwriters." If, on the other hand, the underwriter holds fast to the freight which has been earned, but not yet paid, as an asset of his policy, whilst at the same time the abandonee of the ship also claims and receives it as a beneficial incident of his interest, we have the absurdity of a shipowner abandoning the same thing twice,—that is to two sets of claimants, each of whom has a right to it, and he has to account to both for a sum which only exists singly.

\* Page 1149. And for support of this view he quotes *Case v. Davidson*.

This is one of those cases where in order to support a principle once laid down an inconsistency, if not an injustice, is created in practice. The dictum is, "freight is an inseparable incident of the ship;" and to carry out the "bookish theorick," the right of another class of persons is invaded, or, the insured owner has to pay the same sum twice over.

And if we follow where the principle leads, we are brought to another perfectly logical conclusion; viz. that since freight is an inseparable incident of the ship, the circumstance of there being insurers of ship is of no consequence, it not being their incident but the ship's. It is personally theirs by transference if they have insured the ship and accepted an abandonment of her from the owner; it is personally the purchaser's if the vessel be not insured: but in neither case can it belong to the underwriters on the freight itself, because it is part and parcel of the ship. Although this is a correct inference from the premises, I doubt whether any one would seriously commit himself to the conclusion.

Since the first edition of this book, an important cause had been tried in the Court of Queen's Bench, embracing the whole subject under discussion. The judgment of the Court delivered by Lord Campbell, C. J., in *Miller v. Woodfall*, will be found at length in Appendix, No. 8. A ship in her owner's employ had arrived at Southport, in the river Mersey, on a voyage from St. John's to Liverpool. She was stranded and abandoned at Southport. Inasmuch as the use of his own ship by the owner gives rise to

no contract of freight,—for a man cannot contract with himself,—the only freight which passed in this instance was what could be gained by carrying the cargo a few miles from the stranding place to Liverpool: but Lord Campbell lends all his weight to the view which gives away the freight to the abandonee of ship. It was urged by counsel that only incidental freight passed with the ship, and that as no contract runs with a chattel, freight which by charter is only due at the *terminus ad quem*, the port of delivery, would not so pass. Admitting this, the Lord Chief Justice said, “If the goods on board the ship at the time when the casualty to which the abandonment refers occurred had belonged to third persons, for whom they were to be carried on freight from St. John’s to Liverpool, there can be no doubt that by our law the right to the whole of that freight would have passed to the abandonees of the ship.” Considering that by English law only *unearned* freight is held to pass to an abandonee, the decision seems to support the strongest view possible in favour of the abandonee.

### *The Right to Abandon.*

We have now to consider what circumstances give the assured a right to abandon his interest to the underwriters: and before we seek the support of leading cases to bear out the several positions taken, it is well to obtain a general outline by looking at the subject from the rising ground of common sense. The position of the underwriter towards the assured

is, that for a certain payment, or premium, he undertakes responsibilities which would otherwise fall on the merchant or owner who wishes to be insured. Under stated limitations he agrees to stand in the shoes of the assured and to indemnify him against loss affecting the interest insured. Strictly speaking insurance is a wager between the two parties, grounded upon probabilities, having for its subject some valuable interest, recognised by law, and highly conducive to the welfare and expansion of commerce. But, nevertheless, it is of the nature of a bet, and it must sometimes be construed with the same spirit in which "debts of honour" are looked upon. Thus the *benefit* of the interest insured must be ever kept in mind, not the bare substance of the thing insured only. If, from circumstances coming within the scope of the policy, all benefit is lost to me in my ship or goods, the underwriter has lost his wager, even though some, or all, of the subject-matter remains *in esse*. And if there is a high probability that the thing itself, or all benefit to be derived from it, will cease before it reaches its destination, I may abandon my interest to the underwriter, giving him the opportunity, as far as I can, of taking any course he chooses with the property, to turn it to some value. An abandonment always conceives some degree of option. The underwriter may or may not accept. If the work of destruction has proceeded very far, or its progressive result is very certain, I have no occasion even to abandon, that is, to give notice to the underwriter. He will be equally obliged to pay

a total loss without such notice. But if I am doubtful, undesirous to take the risk of results; if I find no means to get away my ship or to bring home my cargo; if I know that attempts to do so will involve me in expenses greater than the after value of the thing saved, I have a right to throw my burthen on the underwriter and *sell*, as it were, all my interest to him,—the price being the loss he pays me. If he accepts the abandonment he will give his own orders respecting the property which has thus become his own, and then the arrangement made is binding, and he cannot make me retire from it, though circumstances should afterwards occur by which I might again acquire the property back less injured or less hampered by expenses than I had previously imagined. If the underwriter will not accept, my course is not so unembarrassed, yet my right of recovering a total loss eventually may not be injured by his refusal. But I must act more on my own responsibility. I may still decide on cutting the adventure short instead of continuing it, and may fall back on my rights founded on the particular merits of the case. There will, however, be this difference in the effects upon myself, I may have to bring an action against the underwriter; and in that case I shall have to show that the same state of things continued to exist up to that time which operated at the period when I first gave notice of abandonment. Should the circumstances have changed for the better during that time, my right to abandon may have ceased, and I might have no

chance of succeeding by law to enforce my claim for a total loss. An embargo which had placed my interest in a hopeless detention might have been taken off before action; the ship which had been captured might have been recaptured and taken into a friendly port; the vessel which seemed bilged and fixed on rocks might unexpectedly have been got off in that interim, and in a less injured state than was supposed. And thus, my position with the underwriter may have been changed, and my suppositious right to a settlement as for a total loss, may have subsided into a demand for an Average loss only.

There has, it must be owned, been a considerable difference in opinion about abandonment; and Lord Mansfield said, "No right of the assured can vest as for a total loss till he has made the election to abandon."\* This is at variance with what has been just mentioned as to cases where abandonment is not necessary. But war had given a complexion to the decisions and habits of thought of that day; and when judges spoke of total losses they usually had in their eye the very frequent occurrence of capture. Capture was a risk that brought the insurance to which it applied still more nearly into the category of wagers, and the property lost by capture was not destroyed but had got into other persons' possession, from which there was still the possibility of its being rescued and revesting in its original owner. It was necessary, therefore, to have precise and stringent rules for determining this sort of total loss. For

\* Park, p. 352.

the assured was not to have it in his power to throw the onus at his pleasure and at any time on the underwriter, because he saw that his adventure was likely to prove unprofitable to himself. The notice of abandonment must, therefore, be given in reasonable time,—of which I shall speak more particularly in the last section. And it must be given when the assured has information of what appears to be constructively a total loss; for, said Justice Buller, in *Cazalet v. St. Barbe*, “there is no instance where the owner can abandon unless at some period or other of the voyage there has been a total loss.” He means constructive total loss in this sentence. And so if an owner do not elect to abandon till the peril is over, he has no right to abandon when the thing is safe. This seems too plain to require any comment.

If between the times when notice of abandonment was given to underwriters, on news being received of the supposed loss of a ship, and the bringing an action for the amount of the policy, information were brought of the ship's safety, the underwriters would be excused from paying a total loss. The property revests in the owner though there have been an interruption of possession; and the English law does not recognise any change of property by capture till the ship or goods have been condemned.

And an abandonment which would have enabled the assured to recover as for a total loss could not be insisted on where before action brought the state of things was changed. Sometimes an act of



the assured himself will take away his right to abandon and claim a total loss. So, a ship that had been captured and carried into a port and sold,— (and at that moment she was properly totally lost,) was bought back by her captain on the owner's account, it was held that by so doing the loss had been changed from a total to a partial one. Still less, then, would a transient parenthesis in the ownership, a temporary capture for instance, with restoration of property and all the facts known at the same time, afford ground for an abandonment.

On the other hand there are cases where the mere restoration of the thing insured will not defeat the owner's claim for a total loss. So when a vessel had been captured and recaptured and was brought into port, but with a salvage of fifty per cent. and other expenses due upon her, the circumstance of such restitution did not take away the owner's right to abandon. To make this precedent applicable to other cases, it would now be necessary to show that the needful repairs and the expenses on the ship would exceed her value after repairs.

#### *On Goods.*

It is of the very highest importance to define the right of abandonment with regard to goods, because a still greater change of position is produced by it. When goods are insured "free from Average," the right to abandon, if it can be set up, and the sale at an intermediate port, throw that loss by sea-damage upon the underwriter which without the name of *loss*

would have had to be borne by the merchant. As the power to claim on a " memorandum cargo " is therefore somewhat in the choice and will of other persons, it is most necessary to see that a sale was obligatory from the circumstances, and that the stated necessity for selling was neither factitious nor fictitious. But there is no ground for abandonment of cargo as affecting underwriters unless the cause primarily be that of sea-perils. However subsequent circumstances might increase the loss it must originate in the perils undertaken by underwriters or it will not form any claim on them. Thus, the natural heating of a cargo of grain, even when it has occurred through protraction of the voyage by contrary winds and unfavourable weather, and the sale of the grain at an intermediate port, will afford no *locus standi* against underwriters. On the other hand, if sea-damage have attacked such a cargo, and supervening circumstances render the sale of the whole of it necessary and prudent, the position is changed. Nor does long detention of a cargo give generally a right to abandon, because underwriters are not concerned in the rise and fall of markets, but in the safety of the thing itself; so that if it were to take a whole twelvemonth to repair a ship and make her ready to carry home her cargo which had been discharged at an intermediate port, underwriters would refuse an abandonment, and their answer for a reason would be, " We do not care in what time the cargo we have insured reaches its destination, be it long or short, so that it arrives at last." But an embargo, or any detention of kings,

princes, &c. which becomes protracted and presents no prospect of its being taken off, such a detention gives a just ground for abandonment. So too if a ship meet with great damage and is obliged to resort to a port of distress, and there the cargo is landed and the ship obliged to be sold, there is a moral obligation on the master, but not a legal one, to endeavour to hire other shipping and to send forward the goods; but if it becomes a matter of impossibility to effect this—if there are no means of forwarding the cargo, then, even though the goods are themselves sound, they may be abandoned to the underwriters; because through circumstances originating in sea-perils insured against, the cargo has been left in such a situation that the owners of it cannot get possession of it, and it is as much lost to them as if it were at the bottom of the sea, or in any other impracticable place. And if, again, the cargo has been damaged, and it can be shown in a demonstrative manner that to re-ship it would be to bring about the entire loss of its value before it could reach its destination, that is a ground for abandonment. Or on goods subject to Particular Average, though they were in a comparatively safe place, yet were in a vessel that was leaky and would have to remain so for many winter months, and were certain not to arrive at the time at which they would be at their highest value, all these circumstances taken together were held to be a valid ground for abandoning the interest to the underwriters.

*On Freight.*

If freight be abandoned, and the ship be repaired and takes a new freight in lieu of the first, the underwriters are entitled to the benefit of such substituted freight. And with regard to freight, which being a more unsubstantial subject of insurance requires more nicety in dealing with it, there are times when an owner may find it necessary to give up freight upon arrangement, or it may be on calculation preferable and judicious to do so, but an act which is indirectly beneficial to him is not always to affect the interests of other persons. Thus, there may be an opportunity of abandoning the voyage and foregoing the freight, and it may be the most saving course to the owner to do so, for he may see that by continuing the voyage the wages and other expenses of it would inevitably consume it and more : so that a happy termination to the voyage would be the contingency most to be dreaded by him. If then there be some colourable pretext for considering the voyage broken up, and an abandonment made to the underwriters, the motives must be very carefully examined which led to it ; always remembering that with a fully-insured freight a total loss is the most profitable thing that can happen ;—much more so than the fulfilment of the prayer in the bill of lading, that “ the good ship may be sped to her desired port in safety.”

*Method of abandoning.*

It seems remarkable that there should be no stated and invariable form for performing an act so important

in some cases as is abandonment. It is the spirit of the act rather than the letter that in this case is to be considered. It is true, notice of abandonment is usually given in writing, and in much the same words; but it may also be communicated by parol, and will be binding, all other things being valid. The assured writes a circular letter to his underwriters giving them notice that he abandons the interest insured to them; and he frequently gives them what information he possesses as to the cause and occasion of the abandonment. If he have acquired his own knowledge of the loss from Lloyd's List or the daily journals, he will refer his underwriters to those sources of intelligence. The more distinct and direct the manner of giving notice the better; but sometimes an indirect communication, if it be proved afterwards that the underwriters understood it and acted on it, will be sufficient. If the underwriter accepts, he cannot afterwards revoke, except his abandonment was extorted by false information.

But it is not by implication, generally, that the property can be transferred to and vested in the underwriter. Some acts performed by him do indeed imply his recognition of the notice made, and therefore in a court of law no further proof of the abandonment need be given than the statement of the fact that it was duly made, and that the underwriter *paid thereafter as for a total loss*. The paying the total loss seems either conclusive that all proper formal steps were taken previously by the assured, or else it acts as a waiver, and is a proof that the

underwriter has dispensed with some technical formalities.

But if, instead of paying for a loss, the underwriter disputes the claim, then the ownership of the property in discussion is not fastened on him by previous information given, if the giving of it is such as not to be construed as an abandonment. Thus, very full particulars of an accident to the ship or goods may be handed to the underwriter, he may be informed (as in *Thelusson v. Fletcher*) that the vessel was on shore, and that goods insured by him were damaged, and yet this is not constructively a notice of the assurer's abandonment; and in the case alluded to\* that was not admitted, nor the acceptance proved, by the underwriters desiring the assured to do the best he could for the damaged property. And, even, farther, in another case cited by Mr. Arnould, Lord Ellenborough held it was not sufficient notice that a broker communicated to the underwriters that the voyage had been broken up by the capture of the ship and cargo, and requested them to settle as for a total loss and give directions for the disposal of the property insured.

This last case appears to me to be too strong in circumstance to be relied on in future as a precedent; and probably the learned judge framed his conclusion, which is put on the score of imperfect notice of abandonment, on other considerations, including the want of right that the assured might have had to abandon at all from the then position of the property.

A notice of abandonment requires to be direct and

\* *Parmeter v. Todhunter*.

explicit, although limited to no particular form of words. It should give the ground for the abandonment, and refer to the source of information whence the knowledge of the accident was gained by the insured, whether by a protest, a letter received from the captain, a notice in a newspaper, or a paragraph in Lloyd's list. This is to give the underwriter the means of determining whether he will or will not accept the abandonment. It should be signed by the assured or by his agent or broker. Such a notice as the following would be sufficient.—“The Mary having been driven on shore on the Spanish Main on the 10th of June last, and being likely to become a total wreck, as per the accompanying letter from the captain, the assured hereby abandons all his interest insured by this policy to the underwriters. Signed, For the Assured, John Smith. London, 1st Aug., 1856.” The assured will also produce to the underwriters the information he possesses; but he is not obliged to wait till his knowledge of a fact is absolutely certain. Even hearsay, if it has a show of probability, will give him the right to serve notice of abandonment on the underwriters; and in case of ships not heard of, his only knowledge can be negative; a surmise that the vessel has been lost because she has not arrived, and strengthened by such facts as that other vessels departing from the same port after his own ship's appointed time of sailing have already arrived; or that a violent storm was known to have occurred in some locality where the missing vessel was likely to be at the time; or that the enemy's ships had

been seen in such a direction as made it probable they had fallen in with her.

It is of more importance that the notice should be given to the underwriters in proper time ; because it is only just that if I throw up my property and leave it on their hands to dispose of it as they think proper, it should be done when there is yet an opportunity of their acting on my abandonment, and of taking measures to secure and dispose of the property which has in this manner become their own.

Thus the assured may overstay his time in making an abandonment ; and Park cites a case where a delay of five days was fatal to the assured. He did not give notice till five days after the course of post by which the intelligence of the ship's disaster must have come, and this was held to be too late. This indeed appears an unusually severe decision, as a delay of five days is not a long time, and it might have required some hours for the assured to come to a determination as to the course he would take. But it shows that the assured must not act capriciously, or keep the underwriter in a state of uncertainty by his indecision, or elect in his own mind that he will abandon at some future time and so saddle the underwriters with responsibilities not necessarily incidental at the time of the so-called loss.

On the other hand, the underwriter has his reciprocal duty to perform ; and it is incumbent on him to accept or reject abandonment within a reasonable time. This was laid down in *Hudson v. Harrison*. It will always be remembered, however, that an



underwriter's refusal to accept an abandonment which is made on good and sufficient grounds will by no means exonerate him from responsibility, and if the cause was valid, the assured proceeds with his action notwithstanding the rejection of his notice with an equal chance of success. And when once a notice of abandonment has been accepted by an underwriter it is irrevocable as against him, and he is to stand thereafter in the place of the assured; and if any unexpected event should happen to improve very much the prospects of the wrecked property, the underwriter is to have all the advantage of such improvement. And where an abandonment was made and accepted in respect of a ship captured by the enemy, and afterwards restored to liberty, and having taken prizes, it was held that the property having been legally transferred the underwriters had the benefit of the ship itself, and shared in the distribution that was also made of the prizes taken.

*In case of Double Insurance.*

If from any circumstance the same interest has been insured twice, the assured may choose on which policy he will give notice of abandonment and claim his loss. Having selected one set of underwriters, he claims the amount from them, and leaves them to secure the contribution of other underwriters, themselves.

## OF BARRATRY.

Barratry, or, as it is written in the policy, Barretry, is the misdemeanor of the commander or crew of a ship, or of both combined, whereby the vessel and her lading are injured or entirely lost.\* It is a species of loss singularly uncommon; and it will appear the more so when it is remembered how great are the opportunities for wrongful dealing to the masters and crews of merchant ships, distant from observation and every sort of restraint, and isolated in the solitary paths of the ocean. The scope of the word has become very wide, and it now embraces every voluntary act of the persons in possession of a ship at sea in producing any loss or misfortune. All loss and damage under this head are claimable from the underwriters; and though they have no voice in the appointment of a master, yet they are responsible for his acts and his conduct. There is nothing which will exonerate the underwriters from these consequences except the absolute incompetency of the master, his officers and his crew, which, if it can be proved, shows that the ship was unseaworthy from the commencement of her voyage, and therefore that the policy was void from the first.

\* The primitive meaning of the word is somewhat different. It is stated to be derived from the old French word *barratter*, to wrangle, or stir up quarrels; and a *barretor* is a brawling maintainer of quarrels. So, an old dictionary gives the meaning of barretry "in policies of insurance for ships" as dissensions and quarrels among officers and seamen. Bishop Hall uses the expression of "common barretor" for a petty thief, as compared with more daring depredators.

*Collusion with Owner.*

It is necessary that the captain should have no understanding or collusion with his owners in his barratrous acts. If an owner's concurrence can be shown, the act ceases to be barratrous. It may be a conspiracy between the master and owner; but underwriters are liberated from any loss which comes under the head of Barratry mentioned in the policy if there be knowledge and complicity on the part of the owners. And therefore if the master be a part owner himself, there can be no Barratry. It is necessary, however, to state that the assertion of the principle just made requires some limitation since the decision in the Exchequer Chamber (May, 1854) in the case of *Jones v. Nicholson*, which laid down that, if the master, being a part owner, fraudulently sell the ship and goods without the consent of the other part owners of the ship and proprietors of the goods, he is as much guilty of barratry as if he were no owner at all. I am uncertain whether this single case is sufficiently conclusive of the matter, which is of great importance. At any rate the general rule respecting collusion of owners remains untouched: and Barratry is impossible by a master who is sole owner of a ship.

*Wilful Destruction of the Ship, &c.*

The most glaring cases of Barratry are those when the destruction of the ship is compassed by the master and crew; as by boring holes in her and so causing the vessel to founder; the setting her on

fire; or their carrying her away and selling or otherwise getting rid of her so as to possess themselves of the proceeds of the ship and cargo.

*Smuggling.*

But less obvious misdemeanor will come under the name of Barratry. The master may engage in smuggling contraband articles, and the vessel and cargo may thus become forfeited to the Queen. Any permission given by the owners to smuggle being proved takes the case out of the title of Barratry.

*Deviation.*

A ship being insured on a voyage stated to be from A to B, without licence to go elsewhere, is not to deviate from her course and put into C, except under a necessity. This is a case requiring great discrimination to decide at what point the master's conduct becomes barratrous. It is not enough to say that the captain deviated from the voyage, and therefore the underwriters become liable through his Barratry. There are many deviations which have not this character. The master, may deviate in his sheer ignorance that he is restricted from doing so. He may be impelled by the idea of making a great deal of profit for his owner by going to some port or place for which he has no licence given. This again would be an error of judgment difficult to construe into Barratry; and if it can be proved or strongly inferred that the master's act was approved by or was acceptable to the owner, there is a kind of implied

concurrence by the owner which would be pleaded against a breach, in an action against underwriters on the ground of Barratry.

A master of a ship must not deviate from his voyage in order to gain profit by towing or assisting other vessels that may be glad of aid. The laws of humanity override all other regulations, and a master is quite justified in deviating where there is a great necessity, as in order to pick up the crew of a wrecked or burning vessel, or in lending aid to one in great danger of foundering, &c. Should the deviating ship itself sustain damage or loss, the underwriters would remain liable. The conduct of the master and crew would not be barratrous. It would not be on that ground that the deviation leading to loss and damage produced a claim on the underwriters; it would be that the deviation was justified, or rather that it was praiseworthy, under the circumstances.

I am of opinion that a deviation does become barratrous when the owner can show that it has been made by the captain against his, the owner's, wishes, directions, and interests. If the owner can purge himself from all expectation of profit by the deviation, and show that he had done everything in his power to prevent any such deviation, the conduct of the captain will be seen to be more than erroneous; in fact to be so wilful and disobedient as to amount to Barratry.

The general subject of deviation belongs to insurance and not Average, and, therefore, it need not be farther entered upon here. Perhaps there is no

head of insurance law which has given rise to finer distinctions and hair-splitting than deviation, or which involves *intention* so greatly in the discussion of acts.

*Misconduct of Master and Crew.*

There cannot be a question that a vast number of ships are lost owing to the faults and bad conduct of the master and crew. But it is difficult to get evidence in such cases. Sometimes all hands are lost, and no one remains to tell the tale. Sometimes all have been guilty of the same misconduct; master, officers and ship's company may all have been tippling together; and all having been rowing in the same boat, to use an apt idiom, none will make disclosures in which himself is implicated. Again, it is more than probable that the authority of the master is often resisted by the men; and if the resistance be general, the captain, being powerless to punish or secure obedience, cannot help things taking their course. He may not be able to make the crew go aloft in violent weather to take in sail and prevent the masts going; he cannot always keep them to the pumps, or preserve a proper look-out. Yet in my own experience I have found few complaints of such resistance put forward in protests; the log-book more frequently shows traces of an uncomfortable intercourse between the sailors and the officers, but I imagine that, on the whole, there is a great deal of concealment when any accident has happened in consequence of quarrelling and misconduct. Certain it is that not many occa-

sions arise where the plea of Barratry is used to make a claim for loss on the underwriters.

And now, having had occasion to speak a little and indirectly about the part which the master or commander of a merchant vessel plays, I think it a fitting opportunity for enlarging somewhat on the duties and the position belonging to him.

#### OF THE SHIPMASTER'S DUTIES AND POSITION.

##### *His Responsibility.*

Indeed I do not know a member of society from whom more is expected and demanded than from the Shipmaster. I do not remember any class connected with commerce that is trusted so largely and so entirely as the masters of merchant-vessels are. I do not think any person is more liable to be placed in situations of difficulty and of danger, situations requiring caution, self-dependence and integrity, than the captain of a trading ship. Not only is the whole property of the vessel, her cargo and her earnings within his power, and its safety dependent upon his honesty, his prudence and energy, but the very lives of the crew and the passengers hang as it were on the master's experience, watchfulness and sagacity.

Should we wish to place in a strong light the confidence which is reposed in the commander of a merchantman, we may do so by supposing that the proprietor of a large warehouse gave the entire charge of it to a person with whom he had had

but slight previous acquaintance, and whose origin might have been with the humbler ranks of society; that the proprietor intrusted this person with the building itself and the whole of its valuable contents, consisting of bullion and goods, belonging to himself and others to whom he was responsible for their value; that he gave him the keys of the warehouse, and then himself removed from the neighbourhood, leaving this person in possession of it; that he gave him for assistants a number of men collected promiscuously, of whose habits and honesty both of them were ignorant, but over whom this person was to exert authority and command obedience; that he was to secure their good conduct only by the position he held and by the force of his own character. This picture may produce some idea of the responsibility of the master of a vessel laden with a valuable cargo. But it falls short of the truth. For the warehouse we have supposed was built on shore, and was, of course, immovable; it could be visited whenever the proprietor chose:—but the ship is consigned to the most fickle elements, and is in constant motion and change of place. Each one of those elements may be its enemy. Tempestuous winds and seas, hidden rocks and sands, fire and lightning, are by turns ready to destroy the valuable prize floating upon the ocean; and it requires all a master's foresight and perseverance to avoid or to escape from the dangers which everywhere and at every hour threaten that which is in his trust. Again, in a very great measure, the whole success of the voyage and the



undertaking generally as to the production of freight depends upon his judgment and decision.

So great a responsibility and so implicit a confidence impart to the office of the shipmaster a certain dignity which always attaches to the person who leads his fellow-men, and on whose conduct the safety and fortunes of others depend.\*

Again, certain attainments are absolutely necessary to every master of a vessel larger than a collier or a fishing lugger. He must have a competent knowledge of navigation, involving as that does to some degree the sciences of astronomy, mathematics, and hydrostatics. He must be an accountant, to prevent the transactions of the ship getting into inextricable confusion, and to enable him in some trading voyages, where no other supercargo is employed, to undertake the whole commercial department himself. He must know the leading features of mercantile affairs, and even a little law, in order to avoid falling into difficulties and involving others also in them;† and

\* In the cause of the loss of the "John," in July, 1855, Justice Williams said, "By the law of this country, if a man took upon himself an office such as that of commander of a merchant-vessel, for which a certain quantity of skill, care and activity was requisite, he was bound to be ordinarily skilful, careful and active in the discharge of his duty; and if by his unskilfulness, carelessness, negligence or supineness he caused the death of a fellow-creature, he would be guilty of manslaughter."

† Without knowledge of mercantile law and the special enactments for the protection of the revenue, &c., a master may involve himself in serious difficulties. The technicalities are sometimes very minute, and require considerable powers of memory to avoid falling into a premunire. As an example: By the legal Customs' regulations a master may not break bulk nor land any part of his

he is sure to have to do with bills of exchange, bottomry bonds, &c.

A shipmaster also is expected to know the construction of his vessel ; and that sufficiently perfectly to be able to watch and superintend repairs both to the hull, the mastage, and the rigging. The technical knowledge of many masters is very great, and would lead one to suppose that they must have studied ship-building theoretically and practically. They do indeed study it, and that in the most efficacious manner, by having the subject-matter of their study ever near them by night and day, and by feeling the importance of every beam and bolt, every rope and block throughout the vessel. In case of accidents and emergency they become fertile in expedients to replace or substitute what has been lost or damaged. How few people living on shore have any knowledge of the construction of the house in which they live and have lived, perhaps, for years. How very few could understand properly the tenth part of the technical terms of builders or even the names of their tools. Fewer still would have sufficient self-confidence to decide on repairs to be done, or fix the means of setting about the repairs. Yet we must remember all this is known and done by the masters of vessels, and they sometimes display great ingenuity in their temporary repairs, in rigging

cargo if he be within four leagues of any port or place in the United Kingdom, before an entry has been made and a warrant has been granted, under a penalty of £100 ; but he may land *diamonds and fresh lobsters* without entry and warrant.

jury masts, or making and hanging a jury rudder. When this is required at sea, and there is no carpenter on board, it is the captain who must order and superintend the work. In fact, seafaring men become apt and handy; they are often in situations where it is necessary at least to make an effort to accomplish their objects; and they learn, practically, that most objects are attainable to earnest endeavour.

And, lastly, he must be a disciplinarian, both over his own temper and appetite, and over the men who are under his command. It is known perfectly well that a considerable proportion of losses and accidents to ships arises from intemperance. If the master be intemperate or weak he immediately loses his authority over the ship's company, and then the worst consequences ensue. His influence must be a personal one whilst at sea. There is no marine police to enforce his commands or punish a refractory crew. Self-preservation certainly will come to aid him in getting the people to obey him in ordinary circumstances; but it requires some force of character to make men endanger their personal safety, as, for instance, in going aloft to take in sail whilst the vessel is rocking and the masts bending in a storm at night.

The self-dependence which is required for situations of danger at sea, must be his companion in difficult positions on shore. A great responsibility, as we have said, rests upon him. So much depends on his judgment and determination; a wrong step is so

easily taken. It is true that due allowances will be made for his acts if it can be seen that his intention was to do for the best: his *bona fides* will excuse some errors in judgment. Yet not always. A judge or a jury will sometimes be in the humour to fix the responsibility on him not only of acting honestly, but of acting wisely; not only of doing what was best in his opinion, but what was really the best under the circumstances. Thus in the late case of *Tronson v. Dent*, where a ship from injuries received at sea was obliged to put into Singapore, and the cargo was found partially damaged by sea-water, and the master who acted *bonâ fide* and to the best of his judgment, selected some damaged chests of opium and sold them by auction, the owners of the ship were found liable to the consignees of the cargo for the loss arising out of that sale; because it appeared that the captain might have had the damaged opium dried and repacked whilst the vessel was being repaired, and have delivered it, though in a damaged condition, at its destination, along with the other opium. And it was held that it was the duty of the master to have carried the cargo to its place of destination, although in a damaged state.

This decision seems severe; for we should have considered that a shipmaster and his owners would be held harmless for the acts of the former, proceeding under the advice of surveyors, and taking a course which was a very usual one under such circumstances, although a better course might have been possible. It was an error of judgment, and

it is important to see that such errors entail grave responsibilities.

And, again, in the late case of *Avery v. Bowden*, an over-caution of the master, even, defeated its object, while a more rapid decision would have secured it. For an agent at Odessa having told the master of a ship that he had no cargo for him, the latter, instead of sailing away at once under this breach of the charter-party, still remained at Odessa after war had been declared, and repeated his application to the agent for a cargo. It was held that the captain by remaining after the declaration of war, and insisting on having a cargo, waived the breach of the charter-party. So again in the late case of *Sieveling v. Maas*, the question hinged upon a very nice point as to the captain's duty in waiting for orders. By the charter-party he was to wait at Elsinore, on his way from the Baltic, for orders. He called there, but finding no orders for him, he sailed to Leith, where he discharged the cargo. The merchants endeavoured to throw the responsibility on the master of having delivered the cargo at Leith, affirming that he should have communicated with them, residing in London, by electric telegraph. The judges were agreed, however, that that was not his duty, and the verdict was in the captain's favour.

Wherever it is possible, the master, when in difficulties, is bound to communicate with his owners before taking any step of importance. In the case of *Anderson v. Geldart*,\* the captain omitted to do this,

\* *Exchequer*, July, 1854.

and sold the cargo of coals at Lisbon which had become wet from the vessel springing a leak. The owners had to return the freight paid in advance, and to make good the loss on the sale.

Thus then we see again that a fault of judgment, or deficiency of knowledge in a delicate question has serious consequences.

And the judgment of the master has to be exerted for all the interests associated under his charge. As soon as he sails on his intended voyage, he becomes the agent for all parties concerned in ship, cargo, and freight. He stands especially in this position in a foreign port where he may have been compelled to put in by perils of the sea. He may there employ an agent, Lloyd's agent if there be one; and if he take the best advice and assistance he can procure he will be exonerated from consequences, in the same way as a trustee is exonerated who acts under the advice of his solicitor. And the shipmaster is a trustee; and he ought not to permit himself to be persuaded or forced to relinquish that trust. Lord Denman delivered that the captain was agent both for ship and cargo. This being so, nothing less than a special power sent to an agent at that port of refuge by one or all the interests can take away the master's power to act in behalf of those interests: but I do not think that there is any part of a shipmaster's position less understood by him than the relationship existing between agents and himself. Possibly, too, some agents are under a misapprehension about their powers and position; and Lloyd's agents, being clothed with a semi-official

character, are most likely to imbibe wrong ideas respecting it themselves, and to convey wrong impressions of it to others.

The British consul has indeed an actual power in cases of emergency; for he can displace the master for misconduct, and appoint another.

The captain being, then, the agent of the ship primarily and also of the cargo, can, like other agents, bind his principals by his acts: but then they must be honest and proper acts; and they must not exceed particular limits. Thus, he can give a bottomry bond, and that bond will be binding on his owners, and if it be a respondentia bond it will bind the cargo also: but then the subject-matter of the bond must be supplies for the actual needs of the ship, and if extravagant expenditure or private advances be included in it those portions of the bond can be set aside by the Court of Chancery or the Court of Admiralty.

It was held in a case in the Court of Exchequer that the master of a coasting vessel could, by contract made in England, bind his owners, who likewise resided in England, for a loan of money for the necessary use of the ship. (*Arthur v. Barton.*)

But the master must use discretion and, if possible, communicate with his owner before proceeding to execute a bond, otherwise it will not be valid. See the late case of *Wilkinson v. Wilson* in the Admiralty Court.

And the authority of the master stops short in some directions. So he has no implied authority to make

the owner liable for the expenses of seamen, injured by an accident and put on shore, incurred for their maintenance and care ; as by the late case of *Organ v. Brodie*.\*

There are some acts which are permissive to, but not incumbent on, the captain to perform. Thus when his ship is disabled and in a port of distress and she cannot carry the cargo to its destination, the master *may*, but he is not bound to do it, forward the cargo to its intended receivers by other means which he may be able to secure. Should he, however, omit to do this he has not failed in his duty. If he can effect the right delivery of the cargo at the intended port of discharge at a lower rate of freight than that stipulated in the original bill of lading, the receivers are bound to pay the original freight, and an advantage is gained to the shipowner. But should he in the exercise of his discretion think fit to send home the goods in another vessel at a higher rate of freight than was agreed at the first shipment, the receivers of the cargo are bound to accept their goods and to pay the advanced rate of freight. It is required, however, that the master should use a sound discretion, for we

\* Nor can he bind his owners to pay additional sums to seamen under articles, so as to vary their stipulated wages, except when from circumstances those articles cease to bind the crew ; as when from the unseaworthy condition of the ship danger to the seamen's life is incurred in proceeding on a voyage ; then, if the master, acting for the best, makes a contract with the seamen, who agree to incur the additional danger for a farther sum of money, the master's contract will be upheld, he is not acting *ultra vires*, but properly, and as the case warrants. (*Hartley v. Ponsonby*, Queen's Bench, June, 1857.)



have seen, above, that his acts may be repudiated in some cases, if it is clear that a better and more advantageous course was open for him to choose.\*

So again, if he be obliged to sell part of the cargo to pay Average expenses in a port of distress he will select those goods which would be most judiciously disposed of; and as a loss of freight is also entailed by the sale of cargo, a careful master will try to reduce the loss by procuring, if possible, fresh goods to fill up the vacancy in his lading.

He is to regard the interests of all the parties associated in the adventure which he is conducting. He is not to sacrifice one person or class to another. Amongst the others he is to protect the underwriters' interests and rights. It is, unfortunately, the case that some masters of vessels have been taught to think that "the underwriters" are an inexhaustible mine of wealth, and that to let them be plundered, and even to help occasionally to plunder, is a perfectly fair game. False bills for repairs are sometimes connived at; presents are received from tradesmen;

\* In the late case of *Gibbs and Others v. Gray and Others* (Exchequer, May, 1857), where the master of a vessel which had put into a port and could not carry on her cargo, chartered another ship at a higher rate of freight, which was to be paid on a stated quantity; and he did not, previously to this proceeding, consult with the agents of the cargo who resided at that port; and it turned out on the second vessel discharging the cargo that she had less by 120 tons than the specified quantity, it was decided that the captain had no power to bind the merchant to pay the dead freight, *i. e.*, the freight for what was not on board; although he was justified in taking steps to forward the cargo in a prudent manner, and therefore no objection was taken to the higher rate of freight at which the cargo which was delivered came home.

concealments of facts are made, and the like. I believe that this gross injustice really proceeds in many cases from ignorance; from an utterly false notion as to the nature, habits, wealth and knowledge of the underwriters. And it is not to be wondered at if those underwriters, finding out occasionally that they have been used and imposed upon, should become imbued at last with a general scepticism about claims, attributing sometimes wrong motives when none such have existed. And thus there springs up an antagonistic and litigious spirit between the assured and the assurers. Each thinks the other prejudiced against himself; whereas it should be felt that the true interests of both are united; that what affects one of them influences the other also; and that a great saving of expense and trouble would sometimes be effected by a freer communication between the underwriters and the persons insured.

The following miscellaneous particulars of the master's duty and position are extracted and condensed from that very useful and modern book, Maude and Pollock's *Compendium of the Law of Merchant Shipping*.

He is, in the eye of the law, the responsible person, and he can bring an action and can sue for freight under a contract to which he is a party, in his own name. He can also sue the consignee for *primage*, although the latter have settled the freight with the shipowner. He may not trade on his own account, nor earn money by hiring out his services to another person. He has no lien on ship or freight for his

wages or for disbursements made on account of ship during the voyage.\* - He may, unlike the crew, insure his wages, commission, and privileges.† The master's authority over the crew and other persons on board exists not only whilst his ship is at sea, but also whilst she is in a foreign port or river; and to support his authority and maintain discipline, he may use restraint and violence to the persons of those under his influence. Before sailing it is the master's province to procure a competent crew. He is generally personally liable for all Port, Light, and other dues. He is bound to protect the cargo when on board both against thieves and the weather, &c. He is even made responsible, and the master and owners are liable if goods are stolen in port. Also the master was held liable for goods stolen out of a lighter fastened to the ship into which they had been discharged in the Thames. He is bound to prosecute the voyage without deviation therefrom: an unnecessary deviation makes him and the owners liable for loss or damage occurring subsequently. The master is bound

\* These two sentences must now be expunged. By the 191st section of the Merchant Shipping Act of 1854, "Every master of a ship shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of his wages which, by this act or by any law or custom, any seaman . . . . has for the recovery of his wages."

The seamen's remedies are threefold: against the ship; against the owners; and against the master. The master will now have the two first of these remedies.

† Being placed on the same level of advantage as the seamen in recovering wages, it is presumed that, like theirs, his wages are no longer insurable.

to communicate to his owners as opportunities may occur, intelligence of any events that may affect their interests, and especially of any accidents which may have happened to the ship, &c. The master is not merely an ordinary agent, but to some extent and for some purposes he is the owner of the ship for the time being; and thus his acts not only bind his owner's credit, but personally bind himself. So the owner is bound by contracts entered into by the master relative to the usual employment of the ship. He may bind the owners for necessary repairs and for money borrowed and employed for the making them, both when the ship is abroad and at home, if it be in a place where the owner does not reside and where he has no agent and cannot be readily communicated with: but the outlay must be confined to necessary uses. He may sell\* or hypothecate ship or cargo in

\* In the late case tried in the Admiralty Court of "The Glasgow," otherwise "The Ya-Macraw," August, 1856, Dr. Lushington made the following observations as to the power of the master to sell the ship under his command. "The general principle sanctioned by maritime law is, that the master, as master, has no authority to sell; that necessity alone will justify such a sale, and render the transfer valid. The question, then, is as to the existence of an adequate necessity. This necessity is to be judged of by all the circumstances of the case. I will name some of them—first, the state and condition of the vessel; secondly, the consequences of not proceeding to sell; thirdly, facility of communication with the owner; fourthly, the resources of the master, or the total absence of all resources; fifthly, in some degree, too, the power of the master to avert a sale. I conceive that the law inclines against sales of this description, and throws the burthen of strict proof upon the purchaser, for it is his duty to ascertain the authority under which the master acts, or the circumstances which render a sale imperatively necessary; and from this proof,

cases of necessity ; but he cannot pledge the ship *and* the personal credit of the owner ; and an instrument which is merely a collateral security for bills drawn on the owners is void. When a captain sold part of a cargo under circumstances which did not justify such a step, although he was acting *bonâ fide*, both he and the owner were liable to the merchant in an action for trover. Whilst the vessel is afloat or is in a foreign port where there is no agent of the cargo, the master is agent at once for all parties in the adventure, and must act with sound discretion. One of the most critical points he is called upon to decide is whether in the event of the ship receiving such injury during the voyage as to prevent her from completing it, her cargo should or should not be transhipped so that it may reach its port of destination. If the cargo be captured by an enemy or by pirates, the master may ransom it in the latter case ; but he is forbidden to do so by statute in the former instance.

#### OF THE SALVAGE IN CASES OF TOTAL LOSS.

Although there is a distinction drawn between actual Total Loss and that situation which is named a Constructive Total Loss, it is not intended that a

save where there has been a decree by a competent Court, no formality will release him."

And lastly, the master will not fail to take a pilot in every place where his own knowledge is not great, and a pilot can be obtained. To do so relieves him of his own responsibility ; and the circumstance of the ship being under command of a pilot will, in case of accident, also protect his owners against other parties.

Total Loss must be attended with the complete annihilation of the ship, so that it "leaves not a wrack behind," for then Total Loss could mean only that destruction which proceeds from the burning, or the sinking, or the carrying off of the vessel; but it must be such a destruction that though there may remain "a wreck and residue," the idea of a ship, as to its uses, is gone, and what is left is a congeries of planks, something that may be sold in diminution of the entire loss, but not such as could be restored to a sea-going condition. Anything short of this condition claiming to be a total loss must be one under the name of *Constructive Loss*, of which I shall treat hereafter. At present I am speaking of a more absolute species of loss, in which part of the material remains, having more or less the semblance of a ship—and that is called the Salvage.

*Risk of Proceeds.*

The salvage of a ship or of goods, in respect of which the underwriters have paid a total loss or have accepted an abandonment, passes to them as a matter of right. By paying the value to the owner they have necessarily purchased all property in any portion that remains of the interest they insured. The ownership is changed, and the underwriters now stand in the place of the original owners. The agents acting in the matter to realise the proceeds of the wreck are *their* agents. As the underwriters have purchased with the wreck all possibilities of the wreck producing more than was anticipated, so the risk of solvency or

honesty of the agent, auctioneer, &c., is transferred to them also. The proper mode of proceeding in case of a loss is, for the person in charge of the proceeds to account directly to the underwriters, and for the underwriters to pay the loss in full to the assured; but in the course of actual business it is common, and it is generally more convenient, for the assured to receive the proceeds in part payment of his loss, and to come to the underwriters for the balance of it. The non-solvency of the parties at a distance is nevertheless at the underwriters' risk if the remittance be made in proper time and in the usual manner: but should the owner either by negligence, or by interference for some particular object of his own, cause an unnecessary delay in receiving the proceeds, and in the meantime the holder of those proceeds should fail, —or should he take upon himself to order a remittance by some unusual or circuitous course and the proceeds should in that transit be lost, the underwriters are not to be the sufferers through his *laches* or be made to be speculators in the particular design entertained by him when he ordered home the proceeds in that circuitous or unusual course: and the owner must be taken to have received the proceeds, although they may never have actually come into his hands.

*What the Salvage may consist of.*

The underwriters are to take for their salvage all materials, stores, provisions, &c., that belong to the ship. They are also to have any possible advantages, unforeseen at the time of the abandonment or pay-

ment of loss. A question was very lately raised whether iron kentledge were part of a ship's stores so as to pass to the underwriters with the other proceeds. It was tried by the action of *Ingram v. Harrison* and decided that kentledge was stores and passed to the underwriters.

*Passengers' Stores.*

In passenger ships the provisions &c., laid in specially for passengers, are not part of the general property insured under the name of ship. They are generally protected by a separate policy, and therefore the underwriters on ship are not to have them.

*Chronometers, &c.*

Nor are they to have a chronometer, charts or books belonging to the captain; but if the chronometer, charts, instruments, &c., belong to the owners, the underwriters must have the benefit of them. A shipmaster frequently insures his personal property by a policy on "Master's Effects." They are in general warranted free from Average, or free from all Average; but not universally so. When free from Average underwriters are, of course, not liable for any damage by sea water; and as captains' effects, like passengers', are not subject to General Contribution, the insurers thus undertake to protect the master against total loss only. If a few, or a great part, of the effects can be rescued from a loss, which would be total without this exertion, the saving a part will not deprive the captain of his claim as a total loss, giving the insurers the salvage. In the late case



of *Duff v. Mackenzie*,\* an attempt was made to resist payment on this ground, and the case of *Ralli v. Janson* was cited in point; but Justice Williams in delivering the judgment of the Court, showed the distinction between the subject matter in these two cases, and established the doctrine as stated above. He showed by an argument *ad absurdum*, that the master escaping from a sinking ship in his clothes would deprive him of his claim on the underwriters if nothing but an absolute total loss of every particle were intended. So in the very recent case of *Wilkinson v. Hyde* (Common Pleas, Feb., 1858,) various goods, the property of a person emigrating from this country, were insured against total loss only. All the goods were lost except three packages of small comparative value, one containing saws and the other two window-glass. It was held that the assured's right was established to a total loss; for the saving of a small portion of the interest insured did not defeat his claim. It was also stated that this claim was distinguished from *Ralli v. Janson* by the emigrant's goods being of different species.

### *Freight.*

It has been laid down, that with the abandonment of a ship to the underwriters by the owners all profits pass with the chattel to the underwriters, and that to the latter belongs the freight then due. This rule appears very eccentric, almost preposterous. Because freight being an insurable interest, the underwriters

\* Common Pleas, 6th June, 4th July, 1857.

on freight are not to be damaged by having their salvage given away to the ship's underwriters. The next step to this would be to give the underwriters the proceeds of the cargo also, as being incidentally connected with the ship. But this subject has already been discussed in connection with Abandonment of Ship.

#### OTHER CAUSES OF TOTAL LOSS.

*Men of War, Enemies, Pirates, Rovers, Thieves, Letters of Mart and Countermart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes, and People, &c.*

The heading gives a very full list contained in the policy of all those causes of total loss which arise from the acts of men unconnected with the ship. They consist of two classes;—the legalised acts of enemies when nations are in a state of warfare, and of the felonious actions of depredators proceeding against or without the sanction of law.

It must always be borne in mind that total loss means the loss of ship, goods, &c., to those beneficially interested in them; not their actual annihilation. It does not, therefore, lie on the assured to prove the destruction of the interest insured, but only to show that it has been violently taken away from his possession, so that all benefit and use is lost to him. The capture of a ship, then, by enemies public or private is a good loss as against underwriters. But should there be a re-capture of the property by

national vessels of war, before abandonment has been accepted by underwriters and a loss paid in respect of it, the loss is nullified by the property reverting to and re-vesting in the original owner.

The following case, where the policy was on advances, was decided to be a total loss, although the ship after the occurrence named in the declaration, regained her safety.

A quantity of Coolies were shipped on freight, and stated to be the chief part of the cargo. Wishing to effect their escape, they murdered the captain, overpowered the crew, and ran the ship on shore. The ship was afterwards again placed in safety, and was capable of prosecuting her voyage. It was held that this act of the Coolies was piracy, or at least one of the perils insured against, and that the underwriters were liable for a total loss on the policy which was on advances, as the cost of provisions, &c., for these Chinese labourers. There was a total loss as soon as they murdered the captain and forcibly took possession of the ship.\*

In the case of abandonment being accepted but the loss not paid, the underwriters must pay their subscription and take to the re-captured ship. The American law goes farther than this, and will enforce payment of total loss if an abandonment was once rightfully made, although the property is subsequently recovered.

The list contains almost every possible contingency

\* *Naylor v. Palmer*, Exchequer, May, 1853, and Exchequer Chamber, July, 1854.

of this particular kind ; but no list and no statutory enactments can be made to supply an answer to every question that may arise upon the most elaborate legislation. Accordingly we find, very lately, an inquiry as to the meaning of *takings at sea* ; whether the firing into and sinking a vessel, which act was done from a fort belonging to enemies, could be construed into a *taking* of that vessel, so as to bring the loss within the meaning of the policy. The cause came before Lord Campbell, in July 1855, and the circumstances were these.

It was an action brought by Powell and Co. against Hyde, an underwriter, who had subscribed a policy on the cargo of the ship *Bedlington*, from Galatz to London. The policy contained the usual printed clause against " all perils of the seas, men-of-war, pirates, and all other perils," &c. ; but " free from capture or seizure, or the consequences thereof." The vessel commenced her voyage, with her cargo on board, down the Danube. There had been firing on both sides of the river ; by the Russians on one side, and by the Turks on the other. The Russians had batteries and gunboats on their side. On the 19th of March, 1854, *i. e.*, nine days before war had been declared between this country and Russia, the *Bedlington* as it passed these gunboats hoisted the English flag ; but the Russians, notwithstanding, fired into her, and sank her. No attempt was made to capture the vessel, but the crew were taken prisoners. The ship it appears might have been captured with the greatest ease. Lord Campbell directed that a verdict

should be taken for the plaintiffs on the ground of the loss arising from "perils of the seas, pirates, &c.," giving the defendant leave to enter for a nonsuit.

A restricted sense was given to the terms *restraints and detainments of all people*, in the case of *Nesbitt v. Lushington*; a restriction, I think, unintended by the framers of the policy, for they have amplified the meaning of the word *people* by adding "of what nation, condition, or quality soever." A vessel laden with corn was driven into a harbour on the coast of Ireland during a time of scarcity, the people thereabout came on board in a tumultuous manner; took away the command of the ship from the captain and crew; weighed her anchor and drove her upon a reef of rocks, where she was stranded: they then compelled the master to sell all the corn to them at a certain rate, except about ten tons, which were lost. A verdict was given against the assured; for the Court held that the persons who came on board and insisted on this forced sale, and who might, if they had so determined, have taken the corn without any payment at all, were not a *people* in the sense of the policy, and that therefore upon that plea the action would fail. It may be so; but the decision seems opposed to that fulness attempted to be given in the policy, which, short as the whole instrument is, is here even exuberant in its enumeration of this species of rapine.

An embargo is recognised by our law as a *restraint and detainment*; and loss happening in consequence of a ship being detained in this way in her loading

port, after the commencement of the risk, was held to be one for which the underwriter was liable under the above words. (*Green v. Young.*) But there is an exception, apparently on grounds of national expediency, that if the ship of a foreign owner insured here be arrested by an embargo laid on by the Government of the assured he cannot recover for a loss in our courts. The point, however, can scarcely be said to be established.

#### FURTHER REMARKS ON TOTAL LOSS.

##### *Application to Policies.*

When an interest has been insured by two separate consecutive policies, it has sometimes to be decided on which of the policies a loss properly falls,—as the cause of loss may have occurred during the currency of the former policy, and the effect, or actual loss, may have been fulfilled after the commencement of the second policy. Of course it is necessary, to use a proverbial expression, “to put the saddle on the right horse.” Right reason seems to point out that it is to the actual *cause* we must look in determining the question. If it can be clearly established that the ship received her death-wound during the pendency of policy A, that policy must bear the loss alone, and not B, the succeeding one. But the cause may not be so clear. The damage which produces finally her loss may be progressive. Though the ship may not have been quite safe at the termination of the first policy, though injury may be shown to have

begun before its conclusion, yet the event of the loss may be at a sufficient distance of time after the lapsing of policy A to attach the loss to policy B. The ship may have received damage which went on increasing after the commencement of policy B, and it would be difficult to show that the wound received during the running of the preceding policy necessarily led to the ship's destruction, or that there were not some sufficient probabilities in favour of the ship escaping when that first policy ran out. Thus the loss would properly be made to fall on policy B. It may be suggested that an equitable mode of meeting such a case would be to apportion the loss between the two policies. This would open a door to many questions for the future, and would be an expedient not very advisable to resort to. Besides, I shall show, when treating of the subject of seaworthiness, that the words "lost or not lost" in the policy provide for the chance of a ship at sea being unseaworthy at the inception of an original or a succeeding policy. The case is different if a ship return to port before the first policy terminates and the second commences; for then if defects be left in the vessel unrepaired and she sail under a new policy and be lost, the owner would lose his remedy on both:—on the first he would not be able to show that any loss had occurred, and on the second he would be met by the plea of unseaworthiness.\* And another difficulty

\* The judgment recently delivered in the Court of Queen's Bench draws this distinction between *voyage* policies and *time* policies, that on the latter there is not an implied warrant that the

which would present itself practically in attempting to discriminate between the quantum of loss on the two policies, as determined by the causes of loss happening on each, would be the almost impossibility of getting decisive evidence. The ship being lost, it could only be the observation, the memory, the surmises of the ship's company that would be available as data. And however accurate their memory, &c., might be, one most material part of the necessary evidence must be wanting, that of an inspection by surveyors of the ship itself.

*Loss cancels the Policy.*

The loss falling on a policy cancels that instrument, though it be for time. The premium has been earned by the underwriters for the whole period, even though the policy may contain a clause dividing the premium under certain conditions, and providing for a return for each month the vessel is not actually at sea. But though the loss happen in the first month of the insurance, there will be no return of premium.

*Aggregation of Claims on a Policy.*

There can be only one total loss on a policy, but a much larger sum than the amount of the policy may be claimed on it. On a single voyage there may be a General Average Contribution and a Particular ship is seaworthy at the commencement of the risk. This is in favour of the owner in cases of a consecutive policy commencing whilst the vessel is at sea. It also relieves him from any warranty of seaworthiness on a time policy, whether his vessel is at sea or in port,—even the place of the owner's residence.



Average for repairs of damages, and after these there may happen the total loss of the ship. Thus, claims to the extent of 150 per cent. or upwards may be aggregated on a policy. On a policy for twelve months it is easy to conceive a still more fatal series of disasters to arise, so much so that it might give occasion to our Hibernian neighbours to wish that the total loss had been the first of them. The proper means of providing against this contingency, on a single voyage, is to insure the disbursements that have been made on account of damages at an intermediate port,—the underwriters paying their proportion of the premium. Then, if the Average were followed by a loss, the original underwriters would be relieved from all beyond the total loss. A bottomry bond given for the expenses would have the same effect, but the former is the more inexpensive mode of relief.

Now it may strike some persons in reasoning on the liability of an underwriter on a policy, that a single premium should only cover a single risk ; and that although expenses for the purpose of rescuing a ship from loss might properly be allowed in addition to a subsequent Total Loss, yet that repairs stand on a different footing. That if a ship is damaged, if part of her materials be carried away, such for instance as her boats, her masts, her bulwarks,—there is *quoad* those materials a total loss already suffered ; and that when underwriters pay for the reinstatement of those materials they have paid all they can be called upon for in respect of so much of the ship.

They may compare their case with that of goods damaged and partly destroyed, on which they could not be compelled to pay a partial loss and a total loss; that is, they could not be compelled to pay a total loss on that portion of the goods on which they have already paid a piecemeal loss. To illustrate which more forcibly, suppose a ship laden with sugar to have part of the contents washed out by the sea, and she puts into her original port. Here the merchant replaces the quantity destroyed with other sugar; perhaps a few bags in each mark. Suppose the documents to be forwarded to the underwriters, who pay the loss, *pro tanto*. The ship again sails and is lost. The underwriters would not pay a full total loss the second time. They would say, We paid a loss on part of the interest we insured, and now we are ready to pay a loss on the portion that remained when the ship sailed a second time; but we do not for one premium continue our risk on the new sugar shipped. This is perfectly reasonable. The underwriter on ship may say, And my case differs only in this, that the parts of a ship are rather more connected than the parts of a cargo. In the latter a bag is separable from a bag; but it may be that only *part of each package* was destroyed and replaced by filling up; and if so, it approaches very near to my own condition. The masts or the boats of a ship are as separable, as distinct from the ship itself, as bag is from bag; and if it be urged that a mast is an integral part of a ship, I answer, so was the portion of each bag which was destroyed and replaced an inte-

gral part of that bag and of that cargo, and therefore our cases are similar, and we ought not to be called upon on one policy to replace masts, boats or other parts of the structure of the ship, and afterwards to be made to pay a total loss of the very things which we ourselves have given the assured.

We will here leave the argument,—confessing that the parallel does appear to run very close, and almost seems to bear out the propriety of an underwriter being allowed a new premium on the amount of repairs done to a vessel which again proceeds to sea at his risk.

#### *Frequency of Total Loss.*

It has been given as a mercantile axiom that risk is the mother of profit. This is perfectly true with regard to the system of insurance. The data on which underwriters found their scale of premiums are very imperfect and unsystematic, and, also, they are constantly fluctuating with the season, and other disturbing circumstances, of which if it were attempted to take the whole into the problem of probability—(I mean upon some exact system, and not by mental guesswork)—the cycles would necessarily be too great to become practically possible or useful.

It is by a tact peculiar to each individual underwriter of any eminence, and it is these who give the tone to the current premiums, that they make a hasty, almost a prophetic, estimate of the value of a risk offered to them. They do it by a mental arithmetic as indescribable as, and somewhat analogous to, that

of Bidder's; and thus they compute a probability from all the elements concerned, and these are always many. Some underwriters lay themselves out for those risks which are very hazardous and carry large premiums. When ships are overdue,—missing, when they are known to have been in a region where a violent storm has taken place, or ice-fields have been seen, the premium begins to rise, and sometimes attains the price of 80 or 90 per cent.,—so that the greatest possible saving to the assured can be only about 10 per cent. Some more statistics are being added to the underwriters' store; and new surveys are being made of dangerous places, particularly by the Americans who have lately sent an expedition to explore certain marine terrors.

*Amount of Wrecks and serious Casualties.*

The following particulars derived from the Admiralty Register of Wrecks will prove an interesting and fit pendent to this part of the subject. The statistics relate to the coasts and seas of the United Kingdom, a region of the earth where there is a greater accumulation of shipping than in any other spot of similar dimensions: so that the figures can by no means be taken as a test of the amount of losses in other parts of the world. . And it is to be remembered that the vicinity of our coasts is peculiarly fraught with dangers to navigation, not only from conformation and other natural causes, but from the increasing number of steam-vessels which have one or both of their termini in this kingdom.

From a statistical abstract for the United Kingdom, the number of sailing-vessels employed in the home and foreign trade in 1855 appears to have been 17,074; having a tonnage of 3,701,214 tons; and the steam-vessels were 1,480, of 298,216 tonnage. And as the tonnage of British vessels that entered and cleared at ports in the United Kingdom was 10,919,732 tons, it implies that each vessel made three voyages during the twelve months, on an average. Besides these, 7,569,738 tons of foreign shipping cleared in our ports. The number of seamen employed on board the British ships was 168,537.

The number of losses by wreck and collision in 1854 was 484, and in 1855, 419.\* The whole number of casualties, including the above, that occurred to shipping in our seas and on our coasts, returned to the Board of Trade, was 987 in 1854, 1,141 in 1855, 1,153 in 1856, 1,143 in 1857, and 1,170 in 1858.

Although the working of the system of receivers, who report to the Board of Trade, is becoming more exact, the above number of casualties happening in our four seas must be far below the mark.

The analysis of the figures given above was, for 1854, as follows:—

	Vessels.
Totally wrecked . . . . .	491
Totally lost in collision . . . . .	53
Seriously damaged so as to require them to discharge . . . . .	462
Seriously damaged in collision . . . . .	41
	<hr/> 987

\* In 1857, the number was 661.

The analysis for 1855 is more complete and exact, and gives, viz. :—

	Vessels.
Totally lost by wreck . . . . .	272
Totally lost by collision . . . . .	55
Leaky and foundered . . . . .	49
Destroyed by fire . . . . .	14
Found derelict . . . . .	19
Abandoned . . . . .	20
Capsized and sunk . . . . .	9
	<hr/> 438
Stranded and recovered . . . . .	246
Ditto, but whether total or partial in result, not reported . . . . .	167
Seriously damaged by collision . . . . .	178
Slightly do. do. . . . .	14
Leaky, and put back to discharge and repair .	47
Dismasted and otherwise damaged . . . . .	49
Seriously damaged by spontaneous combustion of cargo . . . . .	2
	<hr/> 703
	<hr/> 1141

In the year 1856, the number of vessels totally lost from causes other than collision was 368. There is a little confusion in the manner in which the term wreck is used in the register; but it appears to include all serious accidents to ships at sea, excluding collision. Thus it is stated that the total number of wrecks (*i. e.* wrecks and casualties) was 837, and the number of collisions 316, making a total of 1,153 casualties, against 1,141 in the preceding year. The loss of life was greater in 1856 than the previous year, being 521 deaths. It is also asserted that in the latter year 54 vessels either sank or were abandoned through unseaworthiness.

For the year 1857, the statistical return gives—

	Vessels.
Totally wrecked . . . . .	384
Totally lost by collision . . . . .	53
Seriously damaged . . . . .	482
Do. do. by collision . . . . .	224
	<hr/>
	1143

The number of lives lost in six years was respectively :—

In 1852 . . . . .	920 lives.
„ 1853 . . . . .	689 „
„ 1854 . . . . .	1549 „
„ 1855 . . . . .	469 „
„ 1856 . . . . .	521 „
„ 1857 . . . . .	532 „
„ 1858 . . . . .	340 „

The month most prolific in casualties was January, in 1854 and 1857—there being 258, or upwards of a fourth of the whole number, in that month for 1854; and 281, or one-fourth, for 1857. In 1855 and 1856, the month of December was pre-eminent, having 230, or one-fifth of the whole, in 1855; and 166, or one-seventh, in 1856. In the year 1852, the enormous number of 1,115 wrecks occurred. The number of collisions appears greatly on the increase, and the report of the Board of Trade attributes this fact in a great measure to the incumbering of vessels' decks so as to interfere with the conning of the steersman. But independently of this it is plain that a great cause of the increase of collisions is the growing number of steam-vessels employed. In a large proportion of cases one or both the colliding vessels are steamers.

And as ships propelled by steam proceed without or against wind and tide, and are in motion when sailing-vessels are detained at anchor, they necessarily throw out calculations, and interfere with the precautions which would mainly insure safety if only sailing-vessels were to be provided against.

#### OF CONSTRUCTIVE TOTAL LOSS.

##### *Definition.*

We have hitherto considered those losses where the ship was either absolutely sunk, destroyed, or run away with, or was in a condition which approached so nearly to a complete destruction that what remained of the vessel was an innavigable collection of timbers, planks, &c., "whose only business is to perish;" or, at any rate, to be broken up and used for other purposes. We have now to enter on the discussion of a different kind of loss; total neither in the effect upon the ship itself, nor by the absorption of all the proceeds of a sale; but so far demonstrably total, in a monetary point of view, as to lead to an abandonment of the property by the original owner. When such a concatenation of circumstances arises that to send a vessel forth out of a port of refuge in a seaworthy condition would cost more than the value of the ship itself when afloat, then the *property* may be considered *lost*, though the *thing* itself remain in existence in its original form of a ship. So we speak of a landed estate being lost when it is so mortgaged that a sale



of it would scarcely pay the mortgagee his advances, and the original owner's property in it is merely nominal; for it has really been sold to the lender of the money, who holds the title-deeds and has everything short of a formal possession of the estate. When he forecloses, then the property is absolutely gone and lost, although of course the land itself remains where it was.

*Misunderstanding of its Nature.*

Now a great deal has been thought, said, and written about constructive total loss, and it is more than probable that the name of this kind of claim has been chiefly instrumental in provoking discussions.\* For at first sight it is not a total loss; it is not even a loss at all, in the ordinary sense of the word; it is not even a total loss as regards value, for something is saved, often a considerable proportion of the worth of the ship. What is it then, since it conforms to none of these classes? *It is the hypothetical loss of property*, considering property to be represented by value. It is such a state of things that a given property cannot be retrieved except at an outlay as great as, or greater than, the original cost, or the value when it is rescued. In this sense the

\* In no department of our subject has there been more controversy, more legal warfare, and more uncertainty than in this. The judicial decisions have been so fluctuating, even so strongly opposed to one another, that after the most careful study, consistency and satisfaction cannot be obtained if all the various results of trials and reasonings are to be embraced. Never was there more need of a "reconciling criticism" than for reducing these incongruous elements into order, and to gather clearness out of such contrariety.

money-value can be demonstrated to be in such imminent danger, that to proceed to rescue the ship and keep it in its original ownership will certainly involve as much expense *as to rebuild the ship, or to build a new ship in lieu of it.* And to build a new ship is decidedly a different thing to repairing an injured one. When, therefore, we see what the certain result would be if things take their course and further expenses be incurred, we arrest it on its road to ruin, and realise its value whilst any value can be secured. Thus whilst we have not an actual loss, we have circumstances which would amount to something that would be equivalent to a total loss of value, and by seizing the property in its downward progress we have by a voluntary act averted the actual loss of all, and saved something from the ruin.

It is not therefore the name which rightly should detain us, because there are questions of real practical difficulty connected with this species of claim which I wish rather to discuss,—the liability of an underwriter, and the concurrence of several causes in bringing about a constructive total loss.

#### *Legal View.*

“When we speak of a total loss,” says Justice Park, in his work on Insurance, “we do not always mean to signify that the property insured is irrecoverably lost, or gone; but that by some of the perils mentioned in the policy, it is in such a condition as to be of little use or value to the insured, and so much injured as to justify him in abandoning it to

the insurer, and in calling upon him to pay the whole amount of his insurance, as if a total loss had actually happened." And our courts of law give us frequent proofs by their judgments that combinations of circumstances may arise,—their first causes being in perils for which the insurers hold themselves liable, amounting to something as disadvantageous to the assured as if his ship were entirely lost. Such circumstances are to be construed into total loss: and thus capture by enemies, excessive damage by storms or by stranding, have been fruitful grounds for constructive total losses. It has been decided, too, that the *species* of a thing remaining is not an answer to a claim for total loss, if all use of that thing be lost through the perils to which it has been exposed.

*Usual Forms of Constructive Loss.*

The expenses of restoring what has been destroyed, and of repairing what has been injured about a ship, are the most common form of a ship's *constructive death*. The difficulties of carrying on repairs, or of procuring materials for those repairs; the inability to raise means for paying the necessary disbursements arising in a foreign port; or the exorbitant rate of interest demanded for money required for such disbursements, are the usual proximate causes which lead to the abandonment of a ship to her insurers. The rules which courts of law in this country have laid down to determine in such cases the question of *total loss* or *not total loss* appear

to be these;—that if the expenses of repairing a damaged ship would exceed the value of that ship after being repaired, she may rightly be abandoned to the insurers as totally lost. And again, the course of conduct which a reasonable man, *uninsured*, would pursue under similar circumstances, — whether he would proceed to repair his vessel and continue the voyage, knowing the expenses that would have to be incurred and the difficulties which must be overcome in so doing; or whether he would voluntarily abandon his adventure by selling the ship in her then condition,—will be a guide for determining the question. Whatever course the jury finds a prudent, uninsured owner would probably pursue, will be conclusive as to the underwriter's liability for a total loss.

*Difficulties of applying Rules.*

But whilst definite rules of law are thus fixed, the difficulty of applying them yet remains. Each separate case must rest on its own merits. The entire circumstances are quite the same in scarcely any two instances. The evidence is often doubtful and incomplete: and it is frequently more difficult to ascertain whether the subject under trial answers correctly to the test, than to decide on the result when the test is applied.

*Complex Causes of Constructive Loss.*

But the difficulties do not end here. It has been taken for granted that the primary causes leading to the constructive total loss are those which are

acknowledged by the insurer as affecting himself. In many cases, however, it is a combination of causes which leads to the result; and of such mixed causes some are of a nature which do not affect the underwriter's responsibility, and consequently, in the result of which he ought not to be concerned. For a ship may die a natural death; she may be so weak from sheer old age as to be no longer able to contend with ordinary winds and seas; she may sink from a rat-hole, or perish through natural defects. These causes, though they may result in the total loss of the vessel, are not among the perils which the underwriter took upon himself; and they ought no more to affect his insurance than if he had not underwritten the policy. But still, practically, he is at a disadvantage. Should a ship sink at sea, and the underwriter determine to resist paying a total loss on the ground of unseaworthiness or natural defect, the onus of proof lies on him to show the ground of his resistance,—a thing generally difficult or impossible to do, inasmuch as either all evidence will have perished with the vessel; or, if the master and crew are saved, they will not often lend their aid in preventing a claim of the owner on a policy of insurance. Should it happen, however, that owing to such causes a vessel is forced into a port of refuge, and that she is there abandoned, and, constructively, totally lost, the underwriter might escape by producing evidence as to the cause of her loss:—but let it happen that two or many causes conspire to eventuate the constructive loss of a vessel, some of

them being perils for which underwriters are responsible, and others those for which they are not liable, the logical inference, or at least the equitable one, would be that the underwriter's loss is limited to such a proportion as can be shown to proceed from the circumstances the risk of which he took. But practically it occurs that the *whole result* of such mixed causes is cast upon him, the owner abandoning the ship and claiming a total loss upon his policy.

*Case of the Broxbornebury.*

The case of the ship Broxbornebury, tried in the Court of Common Pleas, assisted, by the verdict given therein, to establish this position. It affirmed for a time the principle that when several causes concur in producing the abandonment and consequent sale of a ship underwriters are liable to the full extent of their policy, with benefit of salvage, although one or more of the causes which conduced to the condemnation were of a nature which the underwriters never undertook to insure against.

The vessel was thirty years old: she had been surveyed and repaired, and classed as a red diphthong. She sailed for the East Indies, encountered a violent hurricane, and was carried into Mauritius. There she was surveyed, and her stern-post was found to be badly started, her bowsprit-beam sprung, her upper-works seriously damaged, and the vessel was leaking badly. The surveyors, beyond this species of damage, found some of a different kind. They found the ends of the timbers so decayed that on putting their

hands into the air-holes they brought out handfuls of rotten wood. One surveyor expressed himself that the ship was "as rotten as a pear." The inspectors then ordered the copper to be stripped off, and the vessel to be repaired. Before, however, proceeding with the repairs, estimates were procured from shipwrights of the cost of effecting them. The estimates amounted to upwards of 40,000 dollars, equal to about 8,000*l.*: and to this sum would have to be added bottomry premium, and some other charges. Upon the ground of the great expenses necessary to repair the vessel and send her to sea again, she was condemned, and was broken up. The owners claimed for a total loss on their policy. The underwriters resisted this claim, and paid into court 50 per cent. of the vessel's value in full of all claims on themselves for repairs and expenses. They also brought evidence to prove that all the damages set forth in the documents for which they as underwriters were responsible could have been effected at Mauritius for about 2,000*l.*, and in England for a less sum. The policy contained a clause admitting the seaworthiness of the vessel when the risk commenced, and the defendants did not seek to impugn the fact of her seaworthiness. The learned judge, in directing the jury, told them that the ship's seaworthiness at the time of the hurricane was admitted; that the law stood, that if the expenses of repairing a ship exceeded her value after repairs it amounted to a total loss, and they must find for the plaintiffs. The evidence on the part of the owner had been that

the value would have been less than those repairs, and the jury found accordingly.

Here, then, the whole question was in issue. Here were two distinct causes at work, the joint result of which was to construct the loss of the ship. Here was a great amount of natural decay discovered when a view was taken of the injuries sustained at sea. The underwriters freely admitted their liability in respect of the damages by sea-perils: but to repair these damages so as to put the vessel into the same condition as she was previously to the hurricane is one thing; to restore her to a perfectly sound, stout and seaworthy state is another. In the former case the underwriters stand by the terms of their agreement, and indemnify for those losses which they engaged to make good; in the latter case they would be doing far more than they undertook; they would be putting the vessel into a better and more efficient state than that in which she had previously been; they would be rebuilding the frame, restoring a time-destroyed constitution, and giving new youth to a ship that had traversed the waters for thirty years.

The question, then, is, to what extent are the underwriters interested in the large sum that was required to put the ship into such a condition that she could emphatically be pronounced seaworthy: and how are their rights affected if the alternative be chosen of selling the ship in preference to entering upon so enormous an expense.

It has been stated, above, as the rule in these cases, that whatever a prudent, uninsured shipowner would



do under the circumstances is the course which an owner insured should pursue. The rule is reasonable, and would be conclusive against underwriters, supposing that *all* the expenses took their rise from sea-perils which those underwriters insured the owner against. But in the case before us it was not so. A very considerable part of those estimated expenses arose from causes which underwriters never guaranteed, and for which it is notorious they are not liable by the terms of the policy. It is a very different affair to abide by the consequences of stipulations we have made, and to suffer by those which come in extraneously to our contract, being such as we never took the onus of on ourselves.

In the course of the argument the late Lord Truro, then Serjeant Wilde, said, "I can distinguish no difference whatever between an absolute total loss and the case where expenses would exceed the value of the vessel when repaired, called a constructive total loss." In the effect upon the underwriter nevertheless, there are material differences between the two positions.

When a vessel is entirely lost by her sinking or by fire, no doubts can be entertained as to the fact of her loss: and although suspicions may arise occasionally, and the destruction of the ship may be attributed to previous unsoundness or some other cause not touching the underwriter, yet the proofs being lost the question cannot be mooted. Not so, however, in constructive losses, where expenses are built up till they reach or exceed the entire value of the thing

insured; because in the latter case the separate members and materials of this consuming expense may be defined, and they may be distinguished into those which affect an underwriter and those for which he is not liable. Without denying that the thing is constructively destroyed, the work of destruction may be shown to have been carried on by two or more forces, and it may be possible to apportion exactly the resultant to the two or more powers. Thus then we hold, that *though the accumulated expenses are indeed tantamount to the loss of the subject-matter of the insurance, they are not necessarily tantamount to a total loss as regards the insurers.* The perils insured against by the underwriters may operate to only the extent of one-fourth of the whole necessary expenses; other defects, not insured against, may create an expenditure equal to the remaining three-fourths of the value. Owners ought not to be allowed to cast all the onus on the underwriters and say, "Causes of a mixed nature have resulted in the loss by sale of the ship; and although three-fourths of those mixed causes are attributable to us and only one-fourth to you, nevertheless, we abandon the whole concern to you, and we claim the total value insured, the same as if the loss proceeded *entirely* from the risks you insured us against by the policy."

It is sometimes said that in a valid case of loss it is indifferent to the owner whether the underwriter completely restore the vessel to her pristine state, or pay him the amount insured. This is not strictly true. There is a difference in favour of the ship-

owner, which he will not be slow to discover, on the side of total loss. For if a ship be repaired, at whatever cost, one-third is deducted from those repairs by the underwriters, and is paid by the owner on the score of *melioration*; whilst in paying a total loss, no deduction is made for the deterioration which the ship may have undergone before she was destroyed. The temptation to owners, and captains acting on behalf of owners, would be too great if they were allowed the option in cases of damages in foreign ports, either to repair or to sell the ship. The advantage to owners attending the latter alternative are so well known that the course would be constantly adopted.

In fire insurance companies the option remains with the office, after a fire, either to rebuild the premises which have been destroyed, or to pay the amount insured, and they select the plan most economical to themselves; and this can never be objectionable to the assured if he be not over-insured, and does not seek to make an unfair profit out of the misfortune. As soon as the people insure with a view to *gain by a loss* the whole character of the transaction is changed, and the system of insurance loses its innocence and value.

I have entered at some length into this particular case of constructive loss because it embraces nearly all the points which emerge from the subject. The result was unsatisfactory in principle, but it was not long afterwards corrected by other causes of a similar kind in which a different conclusion was arrived at.

Thus in the case of the "Sea Horse" the underwriters successfully resisted a claim for total loss; but as there were strong special grounds which weighed with the jury, it is not so applicable to the general principle as a cause which was tried in 1848 before Lord Chief Justice Wilde, and was thoroughly argued.

*The "Alfred."*

This related to the ship "Alfred," by which vessel a claim was set up against the underwriters for total loss both on ship and freight. A very large sum had been insured on each of these interests; and the counsel for the defence pointed out the great temptation which this circumstance is calculated to offer to a master to ingratiate himself with his owners by procuring, or allowing, a condemnation and sale of ship to take place, which would obtain for them advantages so great and so immediate. Had the ship been repaired and her voyage been completed, she would have been worth probably only one-half the sum at which she was valued in the policy. Moreover, the loss of an insured ship is the easiest and most expeditious means of realising her value.

*Bona fides of the Master necessary, and good judgment on the part of Surveyors, &c.*

It was clearly laid down in this trial that the absence of *bona fides* in the conduct of the master and of those concerned in the condemnation and sale of a ship is fatal at once to a claim on the underwriters for loss; and that beyond its being proved to

the jury that everything was done *optima fide*, it must be shown to their satisfaction that the best judgment had been formed which the circumstances admitted, and which men of prudence and ordinary intelligence could have arrived at. It is true indeed that such men, with all their discretion and with the very best intentions, may judge erroneously as to results, but that error of judgment would not defeat the owner's claim on his insurance if it was the best opinion that prudent and disinterested persons were capable of forming. To demand more than the best capabilities of people would be somewhat the same as to say, that had a rock been softer than it was, a ship might not have been destroyed by striking on it. A verdict was given in favour of the underwriters both on ship and freight. I have shown, above, that a loss on a freight policy must always be of advantage to the shipowner at whatever part of the voyage a loss occurs, and the earlier in time that loss takes place so much greater must the profit be to the owner.

It is of the utmost consequence that great discrimination and care should be used in a case where the event partly, and often in a great measure, depends on men's judgment and volition. Our voluntary actions, however much we may desire to do justly and honestly, generally labour under a bias from which the strongest can scarcely free themselves. Here, the stated opinion of skilled persons turns the scale, and decides whether a certain state of things shall be or not be a loss recoverable on the policy of insurance.

Lord Mansfield said, in an analogous case, viz., in a claim for total loss on goods, "the merchant cannot elect to turn that which at the time it happened was in its nature but a partial, into a total loss, by abandoning." (Goss and another *v.* Withers.) And still more caution needs to be used in respect to a certain class of insurances which are effected against *total loss only*. Here, clearly, the position is *aut Cæsar aut nullus*; and there is every inducement to a dishonest shipowner to make the worst of any accident which may happen to his vessel; and the judgment of an upright owner stands in danger of being distorted when interest leans so strongly in one direction. We should not forget the words of Justice Bayley, in *Gardiner v. Salvador*,—"It must always be remembered that there is no such head of insurance law as *loss by sale*." To which Serjeant Shee, after quoting these words, adds, "That which in its own nature is not a total loss, cannot be converted into one by any act of the master."

But supposing that the circumstances of a ship really justify her sale, the question still arises, Is the underwriter always bound to pay a total loss in consequence of the ship being sold? I answer, Not always. I have spoken, above, of mixed causes co-operating to the destruction of a vessel, and in certain cases rendering it imperative that she should be disposed of at a foreign port. But though there be a genuine necessity for resorting to a port of distress; though there be real damage to the ship; a difficulty or impossibility of raising money for disbursements;

though there be *bona fides* on the part of the captain; prudence and intelligence both in himself and the surveyors and tradesmen who examined the damages and estimated the necessary repairs; though there be even a correct judgment formed that the vessel was not repairable, and a valid sale of the ship,—yet, after all, the claim against underwriters may prove not to be for a total loss, but for a partial one. For it is very possible that sea-damage, age, rot, and other causes may combine, so that, as a remedy for all, a sale will be the most judicious course that could be adopted. Such sale may probably remove difficulties; but if the greater part of those difficulties are such as by their nature appertain to the owners, and do not apply by the terms of the policy to the insurers, a sale ought not to saddle underwriters with a responsibility far heavier than that incurred by the owners. It may be, that out of the whole real and probable expenses, one-fourth of them is all in which underwriters are concerned; yet by an abandonment and sale, those parties to whom the remaining three-fourths of the damnifying causes belong seek to throw the whole onus on the underwriters, and themselves escape free.

A sale then must not always be considered conclusive. It must be discovered in what proportions the loss is to fall upon the assured and upon the underwriters. Tolerably exact estimates and calculations can be made from documentary evidence as to the amount of damage for which the underwriter is responsible, and a claim can be made on him for a *quasi*

Particular Average, as though the ship had been really repaired; and in such a case a liberal view should be taken in calculating the possible requirements of the vessel.

Of the master's duties in general I have already spoken: his particular duty to the insurers "is no other than the duty of an honest servant of an honest employer, to those with whom that employer has contracted. Whether he proceeds to a sale or gives orders for repairs, he should carefully ascertain the amount of damage resulting from recent perils of the sea, and of damage attributable to other and older causes; preserving for the satisfaction of all whose interests may be affected by his acts, the evidence which will enable them also to distinguish the one from the other, and thereby adjust their respective losses." \*

I must remark that the tendency of Sir J. Arnould's observations on this subject is not to the same result. After commenting on the cases of *Thompson v. Colvin*, he says, indeed, quoting the note of Mr. Lloyd, "It is of importance to make an express distinction between the *repairs necessary in consequence of the general condition of the vessel*, and those which are required to *make good a damage covered by the policy*." But he has previously stated, that, "the better opinion in the United States, and the law as recently settled in this country, would seem to be, that, if the necessity of the repairs may fairly be referred to the perils insured against, and the ship

\* Abbott on Merchant Ships, &c., by Serjeant Shee.



be shown or admitted to have been seaworthy when she sailed, *the jury need not be told to exclude the expense of such repairs from their estimate*, though, but for the casualty which caused the loss, the decayed parts of the ship might have been strong enough for the voyage." \* And his summary, after adducing the case of *Phillips v. Nairne*, is, "The rule, therefore, on the whole, appears to be this: if the ship was seaworthy when she sailed, the assured may abandon, and recover for a total loss wherever by the perils insured against the ship is so damaged that she cannot be rendered *navigable again*, except at a cost greater than her repaired value; *and in estimating such cost, no deduction is to be made for the incurred expense of repairs arising from her age or state of decay*: if, however, she can be repaired, so as to keep the sea, at a less cost than her repaired value, the assured cannot elect to abandon merely because, owing to her decayed condition, the expenses of *complete repairs* would be greater than this." †

Thus, it would seem that, as the law at present stands, underwriters are responsible not only for the results of sea-perils, but also for the chronic state of weakness and the defects inherent in the ship, but which might have been concealed still longer except from some definite accident which revealed her condition.

#### *On Goods.*

There is not much difficulty in general about losses on goods. If they are damaged to a considerable

\* Arnould, p. 1102.

† Arnould, p. 1105.

extent, and the surveyors are of opinion that it would be more advisable to sell them on the spot than to re-ship them and send them on to their destination, it is considered conclusive as to goods insured against all risks. Perhaps, however, the position may be considered a little shaken by the late decision of *Tronson v. Dent*. The main difficulty arises in respect to goods warranted in the policy "free from Particular Average." It requires strong proof that none of the goods could have arrived at their destination as goods. There can be really very few instances where this is literally the case. The proof of this ought to be very convincing and clear; for if the smallest portion of a cargo could really be brought to its port of destination, it would be an arrival which would negative a claim for total loss.\* We must look to the true object and intention of contracts. When the policy says "free from Particular Average," or "against total loss only," the animus of that condition is to free underwriters from the effects of sea-water and other damages. They wish to protect the merchant from the absolute loss of his shipment, and they charge a lower premium accordingly; one which takes into account that they are set free from certain contingencies which policies against all risks are open to. We must not then allow excepted risks to steal in under changed or feigned names. Nor must we permit the

\* But in the recent case of *Wilkinson v. Hyde*, previously quoted, the saving of a few small packages out of a number containing various kinds of goods, was not allowed to defeat the assured's claim for a total loss.

most ingenious sophistry "to convert that into a total loss which was not one in its own nature." Having taken this precaution a case will now and then present itself where a cargo is truly on its way to perfect destruction, and is stopped on its way by sale, and thus some saving effected on it. A cargo of fruit after damage may by a long detention arrive at such a condition that it is quite clear that when the vessel would reach her destination the fruit would be utterly worthless, and be reduced to a dangerous nuisance ; so that even expenses would have to be incurred to get rid of it. Again, a corn cargo may be heating to that degree that not only it is hourly losing its value and its distinctive character, but is producing danger of the ship being burnt, or the lives of the crew being sacrificed.

*On Profits and Commissions.*

All real interests contingent on the arrival of a sea-going vessel are insurable. If goods shipped to my account, and assured abroad to the extent of the invoice, are likely to realise a profit over and above the amount already covered by insurance, that expected profit is at stake, and I may insure a further sum to render myself secure from the risks of the voyage. Or, if a cargo is to be consigned to me upon which I shall realise a commission as agent or factor, I have also an interest in the arrival of that cargo, for if it do not arrive I shall lose my commission. The usual manner of insuring such interests is with a clause which expresses that they are "free

from Average, and without benefit of salvage." There is, perhaps, no good reason why they should be free of Average, if it be Particular Average that is meant, because the profit is really only the completion of a sum which was not commensurate with the true value of the goods till this addition was made to it. And with regard to General Average, the underwriters are as much exposed to total loss on this as on any other part of the interests, and therefore they are as much concerned in any steps by which that loss is averted. However this may be, these insurances are generally understood and stipulated to be against total loss only; and it, accordingly, becomes exceedingly important to decide what is a total loss of such an interest in the constructive view. I must repeat that the safest guide to a decision in all such matters wherein a question is raised is to ascertain what really is the position of the assured, and what was his intention in insuring. This would save much debating and much legal discussion. If we combine the intention of the person insuring with the exact words inserted in the policy, we shall probably be able to answer any question arising upon the subject with accuracy. Two things are sufficiently clear; that the general intention of such insurances is to protect the assured in case by any accident the expected merchandise does not arrive, does not come into his hands,—for then he loses what he would have gained by its arrival, viz., his profit or his commission: and we must look, therefore, very broadly and strongly on the *prima facie* fact of non-arrival:—secondly, it is equally to

be held in mind that the underwriter is not liable for damages called Particular Average, and that he cannot pay a salvage loss. There can never be any salvage to him, because where goods are sold at an intermediate port the original underwriters on the goods take all the proceeds. If the goods are valued in their policy at a certain sum, they must not be sufferers by an increased valuation made afterwards without their knowledge or concurrence, by having some of the proceeds of the goods given to the subsequent underwriters. We see, then, that there can be no salvage. It is a question of arrival or non-arrival. The arrival of the smallest quantity of the commodity would be sufficient to establish the warranty, and, consequently, their position must not be injured by the will and choice of the master, agent or others, who might determine to sell the whole cargo at an intermediate port, although it contained some small proportion of sound, as being the easiest and most expeditious method of dealing with the whole concern. On the other hand, if there be a real necessity to sell the cargo short of its destination, even though the distance between the two places was only small, it would be a loss within the meaning of the policy: for the effect of that sale would be the same as if it were sold a thousand miles away,—it would deprive the assured of the profit he expected by its arrival at a particular market, or his commission on its sale by him. We remember a case where a cargo of potatoes coming to London had been sunk, and the potatoes were landed at Gravesend. The distance being small,

three or four days might have sufficed to get them re-shipped by other craft and delivered at their destination under usual circumstances: but the accident happened in winter; the potatoes had been wetted, and there was danger of a severe frost coming on; and it was given in evidence by persons conversant with the commodity, that in the state the potatoes were, one night's severe frost would reduce their value to nothing. A sale was therefore immediately resorted to, to save what could be saved. Underwriters admitted this as a reasonable non-arrival, and paid a loss. In another case, a cargo of grain intended for Ipswich got as far as Harwich, where the ship was wrecked, and most of the grain was landed at Harwich. There were circumstances that made it difficult or nearly impossible to carry it on to Ipswich, and the underwriters on profit paid a loss on their policy.

It is very important in these cases to show that through perils of these seas, &c., the merchant, agent, or consignee actually lost the profit or commission he would have had, by the non-arrival of the cargo at the place of its destination. It is equally important to exhibit the real impossibility there was of bringing the cargo to its proper place of delivery.

But a case which has lately been tried in the Queen's Bench is important, and demands some comment, for it seems to militate against the principles just laid down. The issue in the trial of *Halhead v. Young* (May, 1856) was in the form of a denial of interest on a policy on profits. The circumstances were as follows. A ship going from New York to

Quebec, there to load a cargo of timber and convey it to Liverpool, was lost between New York and Quebec, and the cargo, in consequence, was not shipped that season, as no other vessel could be obtained, and thus the profits were lost. All this was contained in the declaration. To cover the risk, a policy had been effected in the usual form, "lost or not lost, *at and from New York to Quebec, &c., and to Liverpool*: beginning the adventure (in the usual form) upon the said goods, &c., from the loading thereof aboard the ship, &c." The object and intention of the insurance had been fully explained to the underwriters by reading to them a letter from the assured; and the premium paid was higher than would have been given from Quebec to Liverpool.

Lord Campbell delivered the judgment of the Court in favour of the underwriters. He said, "The policy was *in truth on goods*, beginning the adventure from the loading thereof aboard, &c. Profit on cargo means the improved value of cargo when landed. But as no goods ever were loaded aboard the ship, the adventure never did begin, or, in other words, the loss of the ship happened before this policy attached. We consider *McSwiney v. Royal Exchange Company* expressly in point. The policy there was on profit on rice, and it was held to attach only on rice actually loaded, not on rice provided and intended to be loaded on board the ship. The construction of the policy cannot be varied by the correspondence set out between the plaintiffs and the agents. We are clearly of opinion that the construction of the

policy cannot be varied by the amount of the premium."

From this judgment we observe the following circumstances. First,—that the Court could see no distinction between *profit* and *timber*. There is however a very great one. Profit is a contingency, and may be lost without the loss *in specie* of the goods from which it is to emanate: as, for instance, if the goods never reach their destination,—or are detained a whole season; because profit exists with relation to times, markets, political events, &c.; and is not a permanent and imperishable commodity. It may be compared to the aroma of fruit. The aroma may be lost by merely keeping the fruit, though the fruit may continue to exist without it.

Secondly,—In adhering thus rigidly to the *printed form* "from the loading, &c.," the *written covenant* is disregarded; viz., "*New York to Quebec, &c.*;"—which is against the rule that the written condition overrides the printed one. Consequently the judgment did not embrace the facts.

Thirdly,—The object of the insurance was clear; and its intention was fully explained when the policy was effected, and an additional premium was exacted for the additional distance and risk. The contingency intended to be insured against happened; the profit was lost;—yet after paying seven guineas per cent., the merchant finds that he is uninsured. The facts as to no other vessel being procurable, and the season being lost, &c., do not appear to have been disputed.



Now, with regard to ignoring the extra premium, and throwing out that enlightening and defining circumstance from consideration, I presume, even after this short interval since the trial, that that course could no longer be taken; and that by the new plea of Equitable Replication, the fact of the increased premium charged to cover an increased risk, and the representation made by the broker to the underwriter from the merchant's letter, would be brought in as subject-matter.

And, even independently of the new pleadings, this throwing overboard the fact of increased premium does not appear in accordance with former decisions. Against it may be set the following expression of Lord Ellenborough, in *Simeon v. Bazett*,—"From the *terms of the policy*, the well-known nature of the trade, and the enormous rate of premium, it was clear that the underwriters meant to insure," &c. And during the course of the argument in *Halhead v. Young* it was urged, "It has been held by the Court of Exchequer, this term, that the Court may look to the surrounding facts in order to see what the parties were talking about." And Justice Crampton said, "According to recent cases the Court may also look at the subject-matter of the contract."

NOTE.—It has been unfortunate that in order to classify, or rather to reconcile, the various cases, not only some violence has been used to drag dissimilar instances under one head, but the very nomenclature itself has been strained from its original use to a *non-natural* sense; and clearness has been lost by thus removing landmarks. The meaning was tolerably intelligible when total losses were classed as *absolute* or *constructive*, although, even then, the double adjective

was in itself objectionable: but now, on reviewing the arguments that have been used and the judgments which have been given, the manner in which they have been employed becomes confusing. Another term connected with the subject, which has been much misused is that of "*a congeries of planks.*" It was first introduced by a very learned judge, and has since been echoed until its distinctive meaning has been dissipated. A vessel being in a hopeless state of wreck, broken, dislocated, and useless for its proper purposes was very well called *a congeries of planks*, rather than *a ship*; for the latter term was taken to imply certain possible uses as well as a certain formal condition of the thing. But latterly any ship injured to a considerable extent seems to be entitled to the same strong term. In the recent case of *Fawcus v. Sarsfield*, the position taken by Mr. Wilde as to a vessel which had received a death-wound,—viz., some concealed injury to the bottom,—owing to which she afterwards sank in a calm sea, was got rid of by Lord Campbell by his saying that, a ship having such a concealed injury or wound "had ceased to be a navigable ship, and had become, in the language of Lord Tenterden, a mere congeries of timbers."

Returning to the proposition that in this matter plain words have been perverted, or, rather, that one word is made to serve for two several things, we trace the perversion gradually taking place in the following series:—

**First,—Loss**, represented the proximate but not necessarily total destruction of an object.

**Total Loss**,—The entire or absolute destruction or disappearance of an object.

Then the pair of opposite terms became,

**Absolute Total loss**,—The entire or actual destruction or disappearance of an object.

**Constructive Total Loss**,—Such a proximate destruction that though the object remained *in specie* and had value, yet it was so greatly reduced in worth and use that it might be construed to be lost,—being *beneficially lost*.

**Next;—Constructive Total Loss**,—Where, though the object remained *in specie*, and with its *uses*, yet where circumstances were adverse, where difficulties were very great, where probable expenses were excessive, and where prudence would dictate to sell at some place short of the terminus of destination.

**Absolute Total Loss**,—Where, though the thing remained,

and in specie, but as a nuisance. Or, where the thing remained in specie, and retaining value, but with the high probability that before it could reach its destination it would be otherwise. Or, where imperishable goods were in the hands of persons out of control of the assured. Or, if by any circumstances over which the assured had not power the goods could never, or within no assignable period, be brought to their destination. (See *Roux v. Salvador.*)

Thus, words have grown away from their meaning.

#### OF SEAWORTHINESS.

##### *Implied in most Insurance Policies.*

Although it is true that the whole system of insurance is one founded upon risks, and the supposed power of the underwriters to calculate probabilities and contingencies relating to marine adventures, it always supposes good faith to be the foundation of the contract between the two parties. Any concealment, therefore, of a fact desirable to be known by the underwriter when he accepts a risk, or any accidental knowledge which the underwriter may have gained and which he perceives the proposer of the insurance to be ignorant of, very properly invalidates and makes void the policy. But it is not only the guilty concealment of a fact which will thus vacate an insurance, there are certain conditions precedent taken for granted, which if they prove to be absent, though without the assured knowing it, the policy is bad. The non-payment of the premium is such a violation; but the underwriters to prevent any danger to the assured on this score, (for the latter would

seldom be certain whether his policy was good or bad, when effected by an agent or broker,) admit, on the face of the policy, that they have received the premium; and they thus do away with the power they would otherwise have in many instances of defending themselves from a claim by the assured on account of the non-payment of the premium. Then there is, on the side of the assured, an implied warrant that the ship is in every way fit to proceed on her intended voyage; and this fitness is called her Seaworthiness. Should an accident happen to her afterwards, and it should be proved that she left her loading port in an unseaworthy state in any respect, the claims, whether on ship or goods, would not be paid by the underwriters. And for this reason, that the insurance was bad from the beginning,—in fact that it never was an insurance. Few people perhaps will object to this principle as applied to the owner of the ship itself, for he above all others ought to have known the state of his vessel, and have seen that she was in all points seaworthy before she went out of port. But it will appear hard in the eyes of many that the ignorantly-innocent shipper of goods by a vessel which proves unseaworthy should suffer by this circumstance, and they will say that such an evasion of the policy is a very hard thing upon him. Undoubtedly it is very hard upon him; but it is equally hard for the underwriter to lose his money by the same circumstance. He insured the merchant on the supposition that he would ship his goods on a vessel sound in itself, sufficiently manned, &c. The

underwriter informs himself on all points in which knowledge is procurable ; but he has not prescience. He cannot guess that though a ship is stated to be good she is decayed in concealed parts of her fabric. Therefore, supposing both assured and underwriter to be equally in the dark respecting such unseaworthiness, it is quite as unjust that the latter should be the loser by this unseaworthiness as the former. The merchant ships by what vessel he chooses ; and he ought to be careful to select vessels belonging to respectable and careful owners. Should he be deceived, and so endamaged by the loss or injury of his goods, he has the remedy of proceeding against the shipowner for the damage which he has sustained.

And of so much importance has the seaworthiness of ships always been esteemed, both in respect of claims which may be made against underwriters for damages, or as a protection against claims made on the ship by proprietors of goods which have received damage, that the notarial document called the Protest always commences with a declaration that the ship at the time of her sailing was "staunch, strong, and sufficiently manned and furnished for the intended voyage,"—or words to the same effect. This form has come to be considered so completely a part of a protest that some notaries and consuls keep the preamble which contains these words in print to be used as a matter of course.

*What is required for a Ship to be Seaworthy.*

To be seaworthy a ship must be staunch, tight, and strong in her hull; her mastage and rigging must be sufficient; she must be sufficiently found in stores and provisions; and she must be manned by a crew of sufficient number for her tonnage and voyage, and have a competent master to command her. If any distinct deficiency should be discovered in any particular after the ship has sailed, she would be declared to be unseaworthy. Such would be the absence of ballast in a vessel of a build which required it. In the late case of *Thompson v. Gillespie*, the ship sailed out of harbour having only a part of her crew on board and met with an accident. This was held to be a case of unseaworthiness, so that a declaration that she had sailed at all would not stand. Or, if it should prove after a vessel had gone to sea that a seam or some butts were uncaulked, though unknown to the owner, occasioning the ship to leak and endangering the general safety, this would be unseaworthiness. How far some hidden defects in a ship at her sailing throw responsibility on the owner for all damages and charges arising on cargo is not perfectly clear, especially since the very late trial of *Dunbar v. Smurthwaite* which was very fully argued, and the verdict was given in favour of the defendant, the shipowner. And in the case of *Losh v. Brockett*,\* a rotten timber in the fore-castle caused the vessel to leak and eventually to

\* Queen's Bench, Feb., 1851.

founder, but the underwriters were nevertheless held liable for a total loss. In a very glaring case of unseaworthiness underwriters would resist a claim for repairs, and also for those charges for putting into port, &c., which otherwise would be of the nature of General Average. But it must be owned that unseaworthiness is generally a difficult plea to support, and it is hard to prove it with sufficient distinctness to convince a jury. Underwriters do not therefore usually dispute General Average charges arising from leaks as to the origin of which a satisfactory account cannot be given: and the decision just cited will be thought by them to have weakened their hands still more in any attempted defence they might make. There is another motive, however, which probably weighs with them in settling a General Average under such circumstances,—that of expediency. And it is wise when property is in much peril, from whatever cause, to encourage any exertions made, and to justify the means taken, to save it.

*The Shipowner is not bound that his Vessel will continue Seaworthy.*

Though it is necessary at the beginning of a voyage, or the inception of the risk on a policy, that the ship should be seaworthy in every sense of the word, it is not imperative that she should be maintained in that condition; all that is expected is that everything will be done that is in the power of the persons in charge to restore the vessel to a seaworthy

state when she has lost that condition. A storm may injure the vessel, her rigging, sails and equipments, so as to render her unseaworthy. An accident or sickness may reduce the number of the crew below what is required for a ship of her burthen; or rot may declare itself in her fabric, which did not exist at the time the risk or the voyage commenced. After any of these contingencies the ship is really unseaworthy. If she put into port to repair damages and replace captain, crew, or stores, those reparations will be made under the inspection of surveyors, and, probably, Lloyd's agent. And a prudent captain will not again proceed to sea until those skilled persons have pronounced the vessel in a fit condition to do so. For should he take upon himself that risk, of sailing in an incomplete state, and should the vessel be afterwards lost, severe blame would be cast upon him, and considerable difficulties might be raised by the underwriters in settling a loss. Yet there are occasions when the conduct of a master in this respect must be looked upon with great leniency and consideration. He is often placed in a situation of much doubt and difficulty. For example: the surveyors may recommend or order that the ship shall be stripped and re-metalled. The expense and the loss of time to effect this may be enormous, and the master may resolve to go home without metal sheathing. I think very great regard must be had to the circumstances, to the captain's *bona fides*, and to the general prudence of his decision. The responsibility of his situation must be considered; he being, *ex officio*,



agent to all the parties concerned. If the proceeding succeed, everybody will think he acted prudently *and as they would have done themselves*. Should the result be unfortunate, every extenuating circumstance ought to be taken into consideration for his conduct.

*Inception of Risk when a Ship is at Sea.*

When the risk on a policy commences whilst a ship is in port in this country, both the underwriter and the owner are able to inform themselves of the condition she is in. But in time policies the insurance may expire whilst the vessel is at sea, and, of course, proof of her state is then excluded. If the exact knowledge of a ship's condition were absolutely necessary to the inception of the underwriter's risk, this circumstance would entirely prevent a succeeding policy being effected when a ship was at sea or in a foreign port; and some other means would have to be devised for giving indemnity to the owner. To meet such a difficulty, therefore, proof of seaworthiness at the time of the commencement of the new risk must be waived, and the only information as to the ship's state will be the antecedent one of her condition when she was in port or was last heard of. Should she in the meantime, that is, after the time of sailing or when last heard of, have become unseaworthy, that circumstance would not invalidate the policy. This position differs from the former one, in which an owner is made responsible for existing defects which he was ignorant of, because he had there the power and there was the opportunity of knowing them by sufficient re-

search ;—but here knowledge is out of his reach, and the state of unseaworthiness may have been reached after the point of time at which the possibility of knowledge ceased. It has been emphatically said that common law is another word for common sense ; and the legislation upon this and other subjects already mentioned, comes recommended to us by its perfect accordance with our notions of justice, propriety and the necessities of the situation. The leading case at law which affirms this principle is that of *Small v. Gibson*, tried in the Exchequer Chamber in November 1850, and the appeal from that decision to the House of Lords, under the title of *Gibson v. Small*, June 1853. This latter is the decision which forms the key-note to Lord Chief Justice Campbell's subsequent rulings in the causes about to be mentioned, relating to the implication of seaworthiness on time-policies.

*General Exception in Case of Time Risks as to Seaworthiness.*

The exception as to the necessity of a ship being seaworthy at the commencement of the risk has been greatly enlarged by some recent decisions ; and, as the law at present stands, *there is no warranty of seaworthiness implied in the case of policies on ships for time*. An anomaly is certainly presented here ; for very frequently the circumstances of a ship are similar, whether the policy on her be in the form of a voyage risk or a time risk : and it may be asked why the same advantage should not be accorded to the

owner in the former as in the latter instance. But the Lord Chief Justice has shown the greatest determination to establish the position.

*Comment on the Cases.*

By the cause of *Thompson v. Hopper*, tried in the Queen's Bench in February 1856, it was decided that on a voyage policy there is an implied condition of seaworthiness; but there is no such condition, overt or implied, of seaworthiness on a time risk, although the inception of the risk and the commencement of the voyage be contemporaneous; not even when the risk commences whilst the ship is at her owner's port. The only plea that will tell in favour of the underwriter is, that an owner should *knowingly* have sent a ship, insured by a time policy, to sea in an unworthy and unfit state, and she be lost *in consequence*,—in which case he cannot recover.

The case of *Fawcus v. Sarsfield*, which almost immediately followed that of *Thompson and Hopper*, in the same court, confirmed its leading features. The ship *Lumley* was insured for time, and at the commencement of the risk she was at Liverpool, where she could have been rendered seaworthy. But she sailed thence in an unseaworthy state; and, without meeting any accident or unusual occurrence, she became leaky, and was obliged to put back to Liverpool and repair. She afterwards sailed again, and was lost. Lord Campbell pronounced the judgment of the Court, which I have considered of sufficient importance to give in full in an appendix.

It was not shown on the trial that the owner had guilty knowledge of his ship's unseaworthiness:—on the contrary, he was taken to have been ignorant of his vessel's unseaworthy condition, and was clear of fraud or concealment. Lord Campbell, in the judgment delivered, confirmed the previous rule that in a time policy there is no implied warranty of seaworthiness; but though exhibiting anxiety to support *Thompson v. Hopper*, and the earlier case of *Gibson v. Small*, in the House of Lords, he used language which leaves a sort of loop-hole, for he says, "We are not absolutely barred from holding in this case that there was an implied warranty of seaworthiness;" but he soon afterwards returned to his postulate, saying, "I think there is no implied warranty of seaworthiness on any time policy." He admits that if the owner violates the *uberrima fides* which ought to prevail in making the contract, by concealing any circumstances which ought to be known, the policy would be vitiated. Still this important conclusion is arrived at, that of two parties who may suffer by the inherent defects and unfitness of a ship, it is the underwriter, on a time policy, and not the owner who is to be the one to suffer. *Why* the underwriter is selected to be the victim we have yet to learn.

However, Lord Campbell did not carry the principle so far as to decide that the underwriters should pay for repairs to the ship when she put back into port,—the repairs being necessitated by the unseaworthy state of the ship, and not by sea perils. *The underwriters are excused from the minor loss whilst*

*they are made liable for the major.* In seeking for an explanation of this apparent inconsistency, one can be found alone in the circumstance that after a ship's loss proof of her exact condition at the time of the event is next to impossible. With lost ships, like the destroyed cities alluded to in sacred writ, "their memorial is perished with them."

I trust that in thus commenting freely on these important decisions of the very learned Lord Chief Justice, I shall not be charged with a want of deference for a judge who has two claims on our respect—being now laden with years as well as with honours.

Since the above remarks were written, the case of *Thompson v. Hopper* has again been before our Courts. The principle involved and the particular circumstances connected with this issue must be supposed to have received no small degree of consideration; a decision, therefore, on the whole matter will have very great weight.

The cause having been appealed on the ground of misdirection of the Judge (Queen's Bench, Exch. Chamber, July, 1858), the Court gave judgment, and the majority of judges was against the appeal. It was held that unseaworthiness *per se* was no defence to an action on a time-policy, and the previous judgment of the Queen's Bench was upheld. Some important observations were made by the Judges in giving their decision.

WILLES, J., said, "In the absence of any wrong or breach of contract on the part of the owner, unseaworthiness is no answer. In effect, there being no

violation of the law, and no fraud in the assured, an increase of risk to the subject-matter of the insurance, its identity remaining, though such an increase of risk be caused by the assured, does not avoid the insurance."

In the course of the judgment the distinction is drawn between a proximate and an immediate cause; so that a ship may be lost from a cause independent of her unseaworthiness, and the loss be recoverable. The maxim of "*Dolus circuiter non purgatur*" was referred to. But the damnifying act may be apart from an intention of damnifying, and may be innocent of consequences.

## PART THE FIFTH.

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### OF PROCEEDINGS IN CASES OF AVERAGE.

#### *In Ship Averages.*

An intelligent shipmaster, often assisted by his mate or first officer, keeps himself informed of all the circumstances relative to the disasters which lead to the losses and disbursements which we name Averages. He enters a tolerably minute record in the ship's journal or log-book, from watch to watch, of all that transpires. On touching land his first care is to note his protest, which preliminary step must be taken within twenty-four hours from the time when such opportunity can be had. He extends his protest afterwards, at his leisure, taking care that it shall be a correct and clear statement of the events of the voyage. In both these steps he must be assisted by a Public Notary, or the Consul or the Tribunal of Commerce, if abroad. If at a port in Great Britain little frequented, when there happens to be no notary resident or within access, he will go

to the nearest Master Extraordinary in Chancery or a magistrate, as a substitute. He will also make a statement of the accident which has happened, to the Receiver of Wreck, who forwards two reports, one to the Government-office and one to the Secretary of Lloyd's. Thus much for official acts. If the master finds that he requires advice or assistance from others he will generally apply to the Agent of Lloyd's, who holding his appointment from the committee of that establishment has some little authority, although vague, in cases connected with the underwriters, and who also carries some weight with various marine insurance offices and associations of underwriters, in virtue of the position he holds in respect to Lloyd's or by direct appointment as agent to the other companies and associations mentioned.

An agent or a sub-agent to Lloyd's he is pretty sure to find at every port of importance or line of coast in our islands. It is not a necessity, however, that he should apply to this agent; there may be no insurance on ship or cargo rendering his interference or advice necessary. He may, rather, select a general agent or some merchant to assist him in his proceedings. And, now, by the reticulation of the electric telegraph, he is able to communicate from almost all places in Great Britain with his owner, who, if the case seem to require his presence, can by the assistance of the railway reach the place where the ship is in a few hours. But if in a foreign country, and without the possibility of asking for the advice or the presence of the owner to aid him, a shipmaster



must depend greatly on himself; and even though he employ a commercial agent, which will generally be found a great convenience, he should never forget his own responsible position, or slacken in that energy and decision of character which will bring a man out of many difficulties. This is sometimes seen in his dealing with salvors and boatmen, who, though a bold and useful set of men, often require to be met by a front of determination to prevent excessive demands or unrequested interference. An active master, assisted by his agents, will seek for good and economical tradespeople in repairing the ship; he will personally superintend the work himself, and will take care that credit for old material and discount for prompt payment are duly deducted from the bills. He will also try and find the least expensive means for raising funds to meet the disbursements. Before he leaves the place he will take care to have all bills paid, and entered in a general account; and that document is sometimes certified by the Consul. Before effecting repairs, the ship should be carefully and minutely examined by surveyors, whose recommendations it is best, as a general rule, to follow.

The documents necessary to support a claim against the underwriters are the protest, the surveys, the general account of disbursements, the vouchers or receipted bills embraced by the general account, the rate of exchange, the bottomry bond, the value of ship, cargo and net freight, the ship's policy, and any letters which may throw light on the transaction or give any information about it.

*In Averages on Goods.*

When goods are found to be damaged in an intermediate port, they are to be carefully examined by competent persons, who will recommend the proper steps to be taken for drying or reconditioning them; or, if there is danger of their perishing or of injuring other parts of the cargo by their re-shipment, then they will advise the sale of such portions as will avoid this inconvenience. When there is an agent for Lloyd's he will in general be called in to assist and advise; he will attend the survey and the sale, and certify to the correctness of the papers, and see that due care is used in all parts of the transaction.

If the damage be discovered at the end of the voyage, at the port of destination, it is still best to procure the co-operation of Lloyd's agent whenever there is one resident. He will appoint proper trade surveyors, and will see that a proper investigation is made, that a correct certificate of sound value on the day of sale is given, and he will be careful that the papers are in all respects complete;—that they state whether the sound and damaged prices are in bond or duty paid; whether for cash or for credit: if the latter, he will annex the usance of credit and the rate of discount. He will be careful to comply with very strict directions which have been issued, and afterwards enforced by a second circular, from the Committee of Lloyd's, to cause a careful selection to be made in case of piece goods, separating the sound pieces, and allowing only the damaged ones to be

sold. He will sometimes interpose where public sale charges are very high and the damage slight, and will prevent the loss and expenses of a sale by auction by effecting a compromise with the merchants, making them an allowance for the actual damage, founded on an estimate by a broker or other skilled person. This is very frequently done in Calcutta by Lloyd's agents, and the auctioneer's commission there is as high as 8 per cent. Lloyd's agent will also examine the log-book, and forward a copy of the master's protest to Lloyd's, or, in some cases, to the merchants whose goods have been damaged: and he will also, whenever practicable, procure the master's attendance at the survey, and get his certificate to the truth of the statement that the goods were really landed in a damaged state from his vessel. A very material and useful document is the actual account sales of the sound portion of the goods. It is nearly always preferable to a certificate of sound value, and it gives important information also as to the conditions of sale, allowing a comparison to be made of the period of credit, difference in charges, the saving of ordinary merchants' commission in consequence of goods being sold at auction, &c. Lloyd's agent will also state the rate of exchange on England prevailing at the time the transaction took place.

Thus the proper documents will consist of—

The protest, or an extract.

A survey by merchants or other skilled persons, and attended by Lloyd's agent.

A survey on the ship's hatches.

An account sale of the sound (similar) goods  
on the day of sale of the damage ; or

A certificate of sound value, specifying length  
of credit and rate of discount.

The rate of exchange.

The policy.

The invoice.

The above would be a complete set of papers ; but  
some of them are frequently dispensed with, as when  
the damage is small it is unwise to increase it greatly  
by heavy expenses for documentation.

When the damage is on goods arrived from abroad  
in this country, the papers required are—

The protest, or the log-book.

The dock landing account, with survey on  
damage attached, as provided by the Act of  
Parliament.

Sales of the whole parcel of goods, sound and  
damaged.

Broker's certificate of sound value, when neces-  
sary.

Account of any extra charges.

Policy.

Invoice..

In case of Produce it is sometimes useful to have  
the deliveries of sound packages of the same  
article, to establish an average sound ren-  
diment.

## OF FRAUDULENT CLAIMS.

This is an ungrateful part of the subject to write about, yet my volume would not be complete were the frauds which are, unhappily, frequently practised or attempted passed over in silence. There is no system or institution however useful and good which is not taken advantage of by dishonest and designing people to procure their own ends, and, by whatever means, to gain money. The system of insurance though so advantageous generally to the spread and safety of commerce, happens to be peculiarly open to fraudulent attempts, from a slight concealment of a fact to deep-laid and well-concerted frauds, which may be termed documentary burglaries. In life assurance the frequency of fraud is becoming more and more certain; and late disclosures have brought to light such extensive malpractices that one almost begins to be shaken in the view which has hitherto been taken of the beneficial effects of life insurance, seeing that the system almost appears to encourage the bad tendencies of men, and to offer a rather easy prey to dishonesty. The managers of fire insurance companies inform us, too, of their conviction that a proportion of claims on them, incredibly great, is composed of fictitious cases, or of arson. It is also certain that marine insurance cannot claim exemption from similar depredation. The effect of fraud is in every way disastrous. It disconcerts the calculations of underwriters as to the premiums for risks; and it creates a general suspicion in reference to claims, although by far the greater

number we may still consider are genuine ones. Difficulty in making settlements causes anger on the part of the assured; and so there springs up an antagonistic and litigious spirit between the insurer and the insured, injurious to both classes, and anxiously to be deprecated by either side. Now anger and law-suits are not sufficient to stop this deteriorating state of things. Spasmodic efforts to remedy some particular wrong are a poor substitute for that general uprightness which should be everywhere inculcated and cherished in mercantile transactions.

There is a good deal of lax moral principle observable in commercial life, and even exhibited in persons who by education and other advantages ought to be superior to the slightest thought of dishonesty. There are many money-getting maxims that pass from mouth to mouth unquestioned and unexamined which would not bear close inspection. The "*rem, facias rem*" advice to youth, the passing over little acts of questionable integrity without comment, or with a smile, helps to destroy gradually that perfect love of truth, and honour in the rising generation which ought to characterise mercantile dealings of every class. Commerce in itself, unless conducted on honourable principles, is a low thing: perfect integrity in its transactions alone raises it to a higher level.

#### *Various Forms of Fraud.*

That class of frauds which consists of concealment or misrepresentation of facts at the time of effecting an insurance applies to the subject of Insurance, and

not to Average. I need not, therefore, enter upon it. I shall only refer to the judge's remarks in the cases of *Morrison v. Muspratt*, and *Lindenau v. Desborough*,\* on a life policy, because it states broadly and distinctly the law of concealment.†

The frauds I have to mention relate to the claims on policies in existence. In insurances on ships they consist of owners getting underwriters to pay for repairs not arising from perils insured against; making them pay for old defects or decay discovered when the vessel was opened to effect the repairs of recent damage; making them pay for improvements, and even in some cases for lengthening the vessel. If the bills are purposely made out to conceal the owner's proper repairs amongst those appertaining to under-

\* Park, by Hildyard, 937 et inf.

† Judge Halliburton gives an amusing story illustrative of sharp practice on both sides, in the case of an insurance broker and his client in New England. Both of them were quakers. The client, having misgivings which amounted to more than a doubt respecting a ship of his, wrote to the agent desiring him to insure, and telling him the partial truth that another vessel which had sailed after his own had already arrived, which caused him uneasiness. The broker, fancying he could read his friend's mind, wrote back that the ship was thought badly of, and that the insurance could only be effected at a high rate, which he named, and that he would complete the insurance if he did not hear again. His client, in reply, said, "Thee need not insure now, as I have received tidings of my vessel." This was too good an opportunity for the other to let pass. He therefore took the risk himself, and returned answer, "Thy letter came too late; I have closed this insurance at the rate named." This was exactly what the shipowner wanted, and he wrote back, "It is well that it is done, since it is done, and the policy will stand; but I am sorry to inform thee that the tidings I heard of my ship were, that she was lost."

writers, it often requires all the skill and acumen of the Adjuster, assisted by a practical Surveyor, to unravel the items ; and, no doubt, after every effort has been used to investigate them, if the accounts are speciously framed, underwriters suffer by them. Again, when the metal sheathing has been on the ship so long that it needs renewing, an owner may prevail on the surveyor to state that to repair the damages it is requisite to strip the ship and re-metal her. In fact, if the surveyor be not a man of integrity he can greatly assist in defrauding underwriters.

False accounts are another plan of fraud. False quantities and prices ; bills simulated altogether,—such materials and labour never having been employed about the ship. We remember a case where by a minute inspection of the water-marks in the paper and some other circumstances, it was discovered that the supposititious bills of a dozen tradesmen had all been manufactured by one penman. The Committee of Lloyd's, within a short period, took the severe but effective remedy in their hands of publishing the names and facts of one or two gross cases of fraud of this kind in the "List." A more common means is for a tradesman to make out two bills for the same work done ; one real, for the owner to pay ; the other expanded, and significantly stated to be "for the underwriters." Again, stores are often charged as having been sent on board which have really never been supplied. The concealment of discounts or allowances is frequently made ; but this hardly amounts to fraud, as in many instances the length of time between



the repairs being commenced and the claim being paid by the underwriters, may have removed any right the latter would have had to the discount if the claim were immediately paid. Nevertheless the concealment of the circumstance is improper. Every transaction should be perfectly above-board, and should be left to the decision of the person entrusted to state the average in respect to the bearing of such circumstances.

A most improper proceeding is, I believe, not unfrequently taken in outports and abroad, that of giving presents to the master to get him to agree to and pass exorbitant charges. It is said that salvors often present the captain with a share of their gain, that he on his part may not resist their heavy claims, and may afterwards give a coloured version of the accident and its consequences.

When any of these practices are discovered it excites in the underwriters and others who were intended to be defrauded by them a just and natural indignation: and, as discrimination is very difficult, it creates suspicion in cases where no ground exists for it; and so by the unscrupulous selfishness of one man an injury is done to a number of innocent persons. And this is the way with crime generally. Independent of everything else that can be said of it, it is very bad economy:—it wastes a great deal to secure a little.

#### *On Goods.*

Frauds in respect to goods' policies are more delicate and still more difficult to discover. There may

be the strongest presumption of wrong dealing, and yet no power to lay the finger on the very thing itself. Yet if it is found that claims *constantly* arise in one particular port, and that at another port similarly situated claims rarely arise; or if it be experienced that claims at A. are always heavy, while claims at B. are generally light when they come, there must be a violent suspicion that claims are made at the former of the two ports when sea-damage does not really exist; or, that when a small quantity of damage exists it is made the most of, and is magnified into a heavy claim on the underwriters.

It has been commonly noticed, moreover, that claims on goods abound when trade is bad and markets are low. I have already named two specific causes of this; one, the greater disparity there will always be between the prices of sound and damaged goods in times when commerce is depressed, or, as it is sometimes said, "when the market is sick;" the other, the greater care which merchants take to recover from the underwriters in every case where there is the slightest pretext, under the conviction that it is very necessary at such times to look after the pence as well as the shillings.

A cause of claims on underwriters is the mistake or the purposed want of observation as to the nature of the damage on goods; the setting down as sea-water damage what was country damaged or arose from the condition in which the goods were shipped.

Another cause of an undue increase of the claim is the non-selection of the damaged portion of a package

from the sound. I have stated that very particular directions were issued by the Committee to the Lloyd's Agents to have this separation made in every practicable instance. I have already explained that there are cases when this division cannot be made with justice to the assured,—as in the instance of an assortment, and some other particular circumstances.

Another cause of increased claim, and one very difficult to detect, will be the untruthfulness of certificates of sound value. Sometimes the “price-to-arrive” is given as the sound value in a falling market, and the comparison is made between this and the actual sale at a later period. Sometimes a quite imaginary value is put upon the goods,—one that they would never realize. This is believed to be the case in some of those places where the certificate of sound price is given in the form of an advance on the invoice cost; and the advance is frequently stated to be 75 or 100 per cent. on cost price,—although we know that at the date of such certificate the market happened to be overstocked with that kind of merchandize.

#### *Remedies.*

It is useless to enumerate farther. It is of more consequence to inquire whether there are any means of stopping frauds, or of securing underwriters against them. One of the most obvious is to appoint vigilant agents and to make it a *sine quâ non* that they shall be called upon to attend the survey and all proceedings about Average cases, so that they may be able to certify to the correctness and the good faith of the

transactions. Another means is to take the trouble of sifting out any suspicious case, and to get every document that bears upon it and examine it by the light of collateral evidence. Another remedy is to cease to insure to such places and such persons as are proved by the underwriter's experience to bring constant and numerous claims. It has even been tried to insert a premium on the sound delivery of goods by returning part of the premium charged in case there is no claim for Average. And, lastly, there is the grand means of individuals enforcing by their own practice and influence a general strictness and exactitude in all matters of this nature, so as to make every certificate and every claim a subject of conscience. And if it be still found that premiums are inadequate on account of the excess in number and amount of claims, there is no alternative except to increase the premium, or to underwrite the risk "free of Particular Average."

## PART THE SIXTH.

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### OF MUTUAL ASSURANCE ASSOCIATIONS OR CLUBS.

The principle of reciprocity, which has become so very general in Life Assurance, has not yet been adopted to at all the same extent in Marine Insurance. It appears, however, to be gaining ground; and during the last few years several clubs or associations for mutual insurance have been established in London.\* But it is among the smaller ports along the coasts of England that the system of mutuality prevails most and is most successfully acted upon. And it will be shown that this system essentially belongs to a small community, and to a limited number of vessels; for when reciprocal action is intended, a personal knowledge among the members of the association of each other and of the shipping each possesses is very material to its prosperity.

The principle is a very simple one in itself. It is intended to effect among shipowners a saving of that surplus of premium over the absolute risk which is

\* One of the largest of the London offices has the name of the "Indemnity Mutual Marine Insurance Company." It is, however, a proprietary office, and the term *Mutual* is, so far, a misnomer.

the professional underwriter's profit. And it is not necessary to proceed upon any calculated tables of what is the dry premium, (as it is called in Life Assurance)—for even that would nearly always be, practically, either in excess or defect of the result of any one year; but, by feeling their way along, as it were,—that is, by making call after call for the actual losses that have occurred, each year is an experiment, and whether it be a good year or a bad one only the exact equivalent to the risk run is paid by the assured.

Though this is the outline of the system, some adjustment is required to make it work in practice. There must be a parity among the members. As to amount, that is easily settled:—the amount for which the club is liable in respect of the ship of any particular member is the sum on which that member is to contribute towards the losses of others. But amount alone will not produce parity. If ships of high and low class are associated together without regard to quality, the owners of the high-class vessels will soon find that theirs is a union in which the advantages are possessed by the owners of the opposite class of ships. The result will be that the superior vessel will be always the loser by its association with inferior shipping. The former class will from its superiority bring in, comparatively, a small quantum of risk, and will for the same reason pay a high proportion of the losses.

Some arrangement must therefore be made to prevent this double disadvantage. In some associations, called A 1 Clubs, only vessels of that registered class

are admitted, and they are thus pretty nearly on a footing. In other clubs an imaginary value for contribution is placed on the ships, apart from the value claimable in case of the ship's loss. In a third set of clubs the disproportion is rectified by the introduction of premiums, of which there are three classes suitable to three classes of vessels. And a fourth plan is, by a return of part or the whole of the third deducted for melioration. Thus: all ships to be valued for the purpose of equalisation at one rate, say 6*l.* per ton: but owners are allowed to value their ships separately at their true value, or at such value as they please. And to encourage ships of high value being introduced a formula is made for settling Averages (not losses), by which the difference for melioration shall be inversely as the difference in value, within the limits of 9*l.* and 6*l.* per ton. It is very difficult to make the expression of this arrangement understood without an example. Here is one.—

An A 1 ship of 500 tons, put into a club at a value of 9*l.* per ton; of which value the club takes as a maximum 1,500*l.*

Amount of Average for repairs to the vessel	. £300
Less for melioration, one-third	. . . 100
	<hr/>
	£200

If the whole value, 4,500*l.*, pay 200*l.*, the sum insured will pay in proportion 66*l.* 13*s.* 4*d.*

To rectify this for high class. As 6*l.* per ton is to 66*l.* 13*s.* 4*d.*, 9*l.* per ton will be to 100*l.* Or as it would stand;—

500 tons at 6*l.*, (3,000*l.*) : 66*l.* 13*s.* 4*d.* :: 500 tons at 9*l.*,  
(4,500*l.*) = 100*l.*

Thus, in this instance, the whole of the melioration deducted is given back as an encouragement for high values,—high values indicating ships of superior quality or class. And the same principle is carried through all intermediate differences of value, 6*l.* per ton giving no augmentation at all on the actual claim, and 9*l.* per ton giving the maximum. Ships of still higher value only to be taken at 9*l.* per ton for the purposes of settlement of Particular Averages.

I fear this will appear a rather complicated arrangement for producing a desirable end. I think a very much simpler one and one more efficacious would be the following.

The object is to compose the club as much as possible of valuable high-classed ships. The vessels of inferior class, having correspondingly low values, *bring in a high proportion of risk and therefore loss to the association; and, owing to low value, bear only a minimum proportion of the general losses in relief.* The following illustration will serve.

Suppose a club composed of 200 vessels of high and low value.

Say, of A 100 ships of 200 tons each =		
20,000 tons, at 10 <i>l.</i> per ton	.	£200,000
And of B 100 ships of 200 tons each =		
20,000 tons, at 6 <i>l.</i> per ton	.	120,000
Total capital of the club		£320,000

Imagine that the effect of fine build, recent construction, and ample supply of spare stores were, that



the 100 A ships had 10 of their number which met with casualties in the course of a year to the extent of 5 per cent. of their value, viz. :

10 ships of 200 tons = 2,000 tons, value 10 <i>l</i> .	
per ton, 20,000 <i>l</i> . Damage 5 per cent. =	£1,000
And that the 100 Æ ships had 30 of their	
number with casualties, in a year, to the	
extent of 10 per cent. of their value, viz. :	
30 ships of 200 tons = 6,000 tons, value 6 <i>l</i> .	
per ton, 36,000 <i>l</i> . Damage 10 per cent. =	3,600
	<hr/>
	£4,600

The 100 A ships would pay	
on 200,000 <i>l</i> . . . .	£2,875 of the Averages.
The 100 Æ ships would pay	
on 120,000 <i>l</i> . . . .	1,725 of the Averages.
	<hr/>
	£4,600

So that we have this unjust anomaly:—that the 100 A ships, which brought in only 1,000*l*. of Averages, pay a quota of 2,875*l*.;—while the 100 Æ ships, which introduced 3,600*l*. of Averages, pay a quota of only 1,725*l*.

Now the remedy I propose would be this simple one; let all the ships, of whatever class, contribute to losses upon one value. Thus

A, 100 ships, 20,000 tons at 10 <i>l</i> . per ton, 200,000 <i>l</i> ., will pay
2,800 <i>l</i> .
Æ, 100 ships, 20,000 tons at 10 <i>l</i> . per ton, 200,000 <i>l</i> ., will pay
2,800 <i>l</i> .

Which will approximate more nearly to a just distribution; but even then, the association of first-class ships with ships of inferior quality will generally be disadvantageous to the former. It will prove the

reverse of the fable of the pot of brass and the pot of earth; for, on these waters, it will be the brazen pot which sustains a greater degree of loss by collision than the earthen one.

Nevertheless, the plan would have the corrective effect of making inferior ships pay something for keeping high company. It would be virtually making them pay a premium inversely as their class. The worse the vessels were, the more expensive would their insurance be to them, which is a similar result to what happens when they are insured at Lloyd's or in proprietary companies. Thus the clubs would be somewhat weeded of the expensive, claim-producing ships; and those of that class which did come in would contribute more fairly towards the general loss. Those which thus rejected themselves owing to inferior class would perhaps form themselves into a distinct club. *Pares cum paribus facillime congregantur*. An association of them might be readily effected; but the same fact would follow them after their elimination from the other club,—the fact *that insurance on inferior vessels is very expensive*. It *must* be expensive whether they are insured with underwriters, whether they are admitted into clubs of heterogeneous classes, or whether they mutually insure their own class. Inferiority of class *will* produce excess of claims.

#### *Constitution of Clubs.*

The ideal of a local insurance club requires that it be formed in a port or place where there is a

limited community, and where the members of the shipowning class are well known to one another ; this implies, what usually follows, that their ships and concerns are also matters of mutual knowledge. These persons combine together upon the principle of a benefit society for reciprocal insurance. No profit is expected to be set aside, no capital is required ; it is a temporary union, generally for one year, during which period the members guarantee one another, or in other words, divide among the whole the individual loss of a "suffering member." The management consists of a committee of some five or more intelligent members of the club ; and there is a secretary or manager, usually also one of their own number. The expenses consist of his salary, which is generally proportionate to the extent of the association :—an allowance of four shillings per cent. is a common rate of payment ; and of such charges as printing, stamps for policies, &c. Indeed the simplicity of the constitution and working of a club is one of its great merits. At the beginning of the year or term a small subscription is usually made for current expenses.

At stated times, but usually once in each year, there is a general meeting, to make, amend, or abrogate rules. These rules are the bye-laws of the society : they are optional, and can be altered from year to year. The policy in use at Lloyd's is frequently taken as the basis of the mutual agreement, *mutatis mutandis*, so as to adapt itself to the form of the association. The policy is also used in order

to comply with the regulations of the Stamp Act. To this policy is affixed a printed copy of the rules. Otherwise the rules are contained in a separate book or sheet: but in either case they are declared on the face of the policy to form an integral part of it. The manager or secretary signs the policies on behalf of the whole of the members.

The rules form a most important part of the subject; for by the provisions enacted at a general meeting an indemnity more or less complete can be secured for the members. Thus if it be desired to provide an indemnity far more full than that granted by the Lloyd's policy, it can be done;—of course at a greater expense in the way of subscriptions, or calls, or drawings as they are termed. If, on the other hand, a slighter insurance be considered advisable, restrictions of any sort can be introduced, and then suffering members recover less, but the expense of the drawings, which take the place of premiums in ordinary insurances, will be proportionably less also. Thus, the wishes and the convenience of the members of the club will determine whether at a large general expense any member suffering loss shall receive a full indemnity; or whether a smaller indemnity shall be granted to suffering members, but at a less rate of calls or premium. Accordingly one club will have repairs paid without deduction for melioration; others will allow for the wages and keep of the crew during the time a ship deviates, or is under Average; another allows for cables parted and anchors lost; one excludes caulking and some other specified repairs. In many,

variable deductions according to age are made for materials and labour; and particular voyages, seasons and goods are excepted; or it is agreed that specified deductions shall be made from claims on ships when they have been engaged in such voyages, during such seasons, and whilst carrying such cargoes.

*Cargo and Freight Clubs.*

The associations to which I have alluded are for the insuring the bodies, stores, &c., of ships. There is another class called Cargo and Freight Clubs. These are intended for the owner's protection when he is carrying coals and other cargo on his own account, and in respect to his freight when carrying other persons' goods. The object of the Freight Club is to insure the owner at all times when his ship is at sea, whether she be loaded, or in ballast. It is taken for a basis that the stores and expenses necessary to send a vessel to sea must have been provided, whether she be carrying cargo, or be light:—and thus, by very natural reasoning, such stores and outfit are connected with the freight or profit the ship earns, rather than with the ship itself as in other insurances. These policies contain two scales of payment in case of loss; one for ships loaded, the other for ships in ballast. The scale is generally a fixed allowance in both cases of so much per ton or keel, and often with distinctions for different voyages. They are sometimes called Freight and Outfit Clubs.

*Limit of Amount of Risk taken.*

One of the most important practical points in insurance, one which is very material to the success of the underwriter, is that an equal sum should be taken on all the risks he writes. By a figure of speech the sum insured by each underwriter is called his *line*, because his signature, the date and amount, are all written on the policy in one line. To *write even lines* is known to be a desideratum, but it is not, or cannot be, always persevered in. But a regulation in almost every club is to have a maximum of amount to be taken. This, however, will not give even lines, because smaller sums are insurable. It is a wholesome provision, nevertheless. An inconvenience arising from it is in rendering the local club only partially serviceable to the local shipowner possessing a large vessel. Several owners in a town may have ships of values from 1,000*l.* to 3,000*l.* The original club may have a limit of 500*l.* for any one ship, and the owners must seek elsewhere if they require to insure more than that amount on their vessels. To remedy this defect, a second club, or even a third, having the same rules and regulations, perhaps the same committee and most of the same members as the first club, is formed; and thus three times the amount of insurance in the same place can be secured by those to whom it is an object.

*Advantage of Locality.*

Though most of the local clubs begin, and some afterwards continue, to insure the ships owned in the

immediate neighbourhood where the club is established, many of them do not reject the admission of vessels belonging to other ports at any distance from home. This sometimes arises from the shipping of the place not being sufficient by itself properly to support a club;—for it is essential to every species of insurance that there should be a considerable number of cases, to afford scope for the cycles of probabilities to develop themselves,—in other words, to give an Average: but it also arises from the ambition of making a large club, or from the natural wish of the manager to increase his remuneration, which depends on the amount insured by the club. Yet, in my opinion, the introduction of these stranger ships is in general a detraction from the safety of the association and from that feature which seems to me an essential, viz. locality. If fifty men, possessing among them one hundred vessels, and living in the same place, unite in an association of this kind there is something personal and familiar in its character. Every one is known: every ship is also known, so that hazardous vessels, or owners of bad repute can be excluded from entering the club. Then the exact manner in which each vessel is found in stores, spare sails, spars and ropes, is also a matter of knowledge and conversation among the members; so, also, the usual trade of the vessel; and what is more important, perhaps, than all, the masters are known. Being known, the good and successful ones are prized and sometimes are even rewarded by the clubs, whilst the bad and ignorant masters or mates are dismissed,

since the club will not admit a vessel which is not provided with a competent, sober, smart master and officers. Probably from deficiency in the two respects of stores, and masters, one-third of the whole number of losses occurs. Of collisions perhaps *two-thirds* might be avoided if there were more care used in looking out, more presence of mind discovered when a collision was probable, and more strict attention paid to the Trinity rules for steering and showing lights.

Another advantage in a limited and local club is, that when a disaster to a ship occurs, it is superintended and watched by members of the association, some of whom are practical men able to survey damages, direct repairs, and go the cheapest way to work in the matter of expenses. Probably one-third of all the money spent in repairs and expenses of ships under Average is lost by extravagance and bungling.

#### *Method of Paying the Losses.*

There are no such things as Premiums in the system of clubs. Premiums of Insurance are sums paid in advance, being the calculated equivalent of the risk undertaken, and including a profit to the underwriter. In the mutual principle nothing is paid for profit. Clubs are truly *benefit societies* on a large scale, their object being to guarantee members mutually from a particular class of loss. In some clubs a small fund is subscribed at the beginning of the year for the convenience of making prompt pay-



ments; but the general plan is to hold periodical meetings of the committee, when all claims sent in are examined and discussed, and those which are found to be in order are collected in one sum, and a call is made on the whole capital of the club, called "a drawing." The drawing is frequently effected by bills which are accepted by the several members. There are clubs which make their payments for losses in these accepted bills; but that plan appears very clumsy, and is open to some risk, and the more usual way is to pay a check for the loss, and for the manager or secretary to collect the quotas of all the members.

As soon as a member has lost the ship which was placed in the club, mutuality ceases in regard to him. A certain period is assigned, differing in various clubs, after which the suffering member is no longer a contributory to the losses of other members. Possibly this is an imperfection, and might be amended. Each association being for one year there should, perhaps, be a unity of interest and risk for that time, and a liability to contribute reciprocally on the sum entered in the club, whether the ship be lost or safe. Otherwise the insurance has something the character of a lottery; and the member who is fortunate enough to meet with a loss early in the year, receives payment at once, and pays scarcely anything for his indemnification: whilst, on the other hand, the number of contributaries contracts as the year progresses, so that with each new loss the ratio becomes higher upon the remaining members.

*Adjustment of Claims.*

The committee of management generally decide on the claim for losses and damages made by the members. In some clubs the manager, being a man of experience and intelligence, prepares the claims for the meeting of the committee, so that this part of their functions does effectively rest very much on him. In some associations it is a rule that the claims shall be adjusted according to the custom of Lloyd's. In others all the claims are to be submitted to some London Average Adjuster. In most of them there is a clause relative to the arbitration of disputed claims, giving power to refer such disputed claims to a single arbitrator, or to two; one being named by the committee, and one by the suffering member, the referees having power to appoint a third, or an umpire.

*Clubs not so applicable to very large Communities.*

I have shown that the character of the constitution of these clubs has something essentially local in it; and as soon as there is a large importation into a club of ships foreign to the port where it is established, it loses one of its important characteristics. It appears to me, that the club system is not developed purely and properly in a very great community, like that of London or of Liverpool. That reciprocal knowledge which I have mentioned is wanting. The club becomes to most purposes an ordinary insurance office, without that variety of risk in which there is safety, and having the disadvantage of leaving a great

deal of power in the hands of a junto of persons, the committee, who, if they be not very upright men, may pass their own or some favoured member's claim, and reject the claim of another member on insufficient grounds. And there cannot be that surveillance exercised on the vessels, on the manner in which they are found in stores, and on the masters who command the ships, as is possible in a small and connected neighbourhood.

*Great Variety in the Rules of Clubs, and some Specimens.*

Having already stated that it is clearly in the power of a number of consenting persons to bind themselves reciprocally to grant any degree of indemnity determined upon, so it is equally in their power to introduce any rules which may be thought proper. The rules of some clubs are very long and minute; others are shorter, and leave more power with the manager and committee. The rules of two or three associations having been drawn by a solicitor have had a legal circumspection and lengthy verbiage given to them which have swelled them into a small volume.

I will now select a few points from various club rules which are distinctive, and from some of which useful hints may be taken as to the requirements or the dangers of certain trades and parts of the coast. There is no part of the country where the system of clubs is better understood than along the north-east coast. When it is efficiently carried on it is a simple

and an economic means of keeping shipping insured, and in a very well-managed club, I am informed that, during a considerable series of years the calls have not averaged more than 5 per cent. per annum. This was in a club very local in its constitution, and where a strict surveillance was maintained: but I know that in some other clubs, which have been more indiscriminate in the ships they have taken in from distant ports, the calls have sometimes amounted to 10 and 12 per cent. in the course of a year, and probably there are some which would show a still heavier result. In the latter case the reciprocal system becomes a very expensive method of insuring a ship.

#### *Hazardous Cargoes.*

Many of these associations are for the purpose of insuring small vessels carrying, usually, heavy cargoes of very small value. Such cargoes throw an extra risk upon the association, both from their nature, and from the small value they possess on which to contribute when there is a General Average. A compensation is therefore made by vessels carrying such cargoes in the form of a deduction from the amount of claim; and according to locality of the clubs various articles are excluded from the rules of one which are not mentioned in those of another.

#### *Hazardous Voyages.*

Strict limitations are also made in respect both to the times of sailing and the voyages and ports to which the vessel is bound. The clubs generally

concur in the broader distinctions of season, and of the times when increased danger belongs to voyages to the North Sea, Canada, &c. ; but most of the clubs have also their local dangers which they desire to avoid,—hazardous ports, tidal harbours, rivers, &c., which are practically known to be dangerous at certain seasons or at all times of the year. In some of the policy-rules these limitations are exceedingly stringent and minute. I might mention, as an illustration, those of the *Newcastle A 1*, the *North Shields General*, and the *West Hartlepool* associations. These limitations are enforced by deductions from claims when they occur in respect of the excepted season or place, or by an extra premium charged. But as the rules of clubs, generally speaking, are rational and not needlessly oppressive, as would be expected from the result of deliberations for the reciprocal advantage of the members, so we find easements to the forfeits and extra premiums just mentioned ; as, for example, in the *General Sussex Mutual Marine*, where it is provided, that if a vessel sailing contrary to the limitations do not procure any damage thereby, one-half the extra premium incurred by such infraction shall be returned. So again, the same club legislates, that if the owner of a ship be not accessory to his vessel sailing contrary to the warranties and rules, he is to be held harmless of the consequences of his captain's independent acts.

*Adjusting Averages.*

I have mentioned, above, that the committee or the manager is frequently entrusted to state the claim of a member whose vessel has sustained damage or has incurred expenses. These claims are adjusted in reference to the special rules of the club, but taking the "custom of Lloyd's" for the basis. In some associations it is stated that the rule of Lloyd's is to be adhered to,—as in the *West Hartlepool Mutual Marine*. In the *Victoria of Newcastle*, all claims are to be made out by a professional Average stater. In the *Whitby Clubs* the Average claims are to be settled by an Average stater at Lloyd's. In the *Topsham A 1 Club*, claims may be made out with or without a London Average stater; but as much as possible in conformity with Lloyd's, by the *Jersey Mutual*. Then, as a remedy for any dissatisfaction a suffering member might feel in the result of a statement drawn up by the insurers, there are several provisions. Thus, in the *Topsham A 1 Club*, he may procure another statement to be made at his own expense, and the club may compromise between the two Average staters, or may call in a third. By the *Sussex Club* rules the suffering members may refer the case to a general meeting;—whilst the most usual course is that prescribed by the arbitration clause, by which, in general, under particular limitations of time, &c., an arbitrator is to be chosen by the suffering member and another by the club, and the two arbitrators have power to call in a third as umpire;—or, as by the *London*

*Equitable* rules, the suffering member and the committee may agree mutually to refer the claim to one arbitrator whose decision is to be final.

*The special Rules of a Club to be considered Part of the Policy.*

But in adjusting a claim reference is to be had to the warranties, rules and conditions annexed to the ordinary policy, and which are by most clubs declared to form part of the policy itself. Thus many modifications, some very judicious, are made in adjusting Averages for clubs.

*Limit as to Amount.*

So we have a scale according to class, in the *Sussex Clubs*.\* The claims must amount to four shillings per ton in the first class, four and sixpence in the second, and five shillings in the third ; but no deduction to be made previous to testing the amount. In the *Selby Club* the exclusion is as high as eight shillings a ton, old measurement, and six shillings per ton in the *Colchester and Maldon Mutual* ; whilst it is as low as three shillings a ton in the *West Hartlepool Club*. In the *Jersey Mutual* there is a clause in favour of locality in repairing,—the exclusion being three shillings per ton, if repaired in Jersey, and five shillings if repaired elsewhere. In the *Newcastle General A l* the repairs must amount to four pounds

\* By the *Sussex Clubs*, I refer to the *Sussex and Shoreham Mutual Marine*, and the *General Sussex Mutual*, now united in one ; the rules of which appear to me to be very equitable and well-digested.

per keel at each separate accident; in the *North Shields General* Particular Average is excluded under three pounds per keel.

*Deductions for Melioration.*

Then, as to the deductions on the score of new for old there is as much variety. In the *Sussex Clubs*, claims for repairs on the hull of A 1 ships are paid in full for the first three years, and on other classes in proportion; whilst stores, joiners' work, boat-builders', blockmakers', and sailmakers' work, &c., are paid without deduction for the first year, and for the first six months in other classes. And from the metal sheathing the deductions are one-sixth if it have been on one year; one-fourth, if two years; one-third, if three years; and one-half, if on four years. The deductions in the *South Shields Unanimous* and the *South Shields Maritime and Mercantile* are, none for the two first years, one-sixth during the third and fourth years, and one-third after four years. The *North Shields General* grants repairs in full for the first three years, if the vessel be oak-built. The *Kent Mutual* allows repairs in full for two years, with certain deductions from metal sheathing. The *Selby Insurance Society* gives repairs on the hull in full for the first eighteen months, and deducts one-third from them afterwards: and deducts one-half from masts, sails, rigging, boats, cables, &c.; chains and anchors in full:—but in all cases, in this club, the loss must be eight shillings per ton on one voyage. In the *Whitby Clubs* the labour bill is paid without de-



duction if it be advanced by the owner without profit.

It is a common rule in clubs that bulwarks and quarter-boards are not allowed to enter into the calculation of the necessary percentage of damage, but they may be allowed when the damage suffices independently of them. And it is a general and wholesome rule not to allow the caulking, unless the vessel have been caulked thoroughly within five years of the time of the accident.

In a few instances, where repairs are very extensive, one-third is to be deducted on repairs to the extent of 60 per cent. of the ship's value, and the repairs above that limit are to be paid in full. This rule is to encourage owners to repair their vessels instead of abandoning and selling them; for it nearly always happens that repairs are better for underwriters than a sale.

*Certain specified Stores required.*

From the greater inquisitorial character belonging to a club, it is able to prescribe certain stores as necessary for making the vessel admitted "seaworthy;" and, in some measure, to watch and see that those stores, &c., are provided. This personal inspection constitutes the greatest advantage of clubs over other insurers, for a well-found ship is a very different risk to underwriters to an ill-found vessel. Thus, several of the clubs prescribe the extra stores a ship shall carry; the number and weight of her anchors and chains, &c.; and a vessel not having the

necessary quantity of stores on board and meeting with an accident is to be placed at a disadvantage.\* In several, the rule is made very stringent; and in some the deficiency in this respect is met by a deduction of 15 per cent. from the amount of the claim on the club: whilst in the *London Maritime* the deduction is left discretionary with the club up to the proportion of 50 per cent. of the claim, and in another association the discretion is even higher.

*Anchors, Chains, &c., how paid for.*

The manner in which anchors, chains, &c., are dealt with in clubs is very various. In some, as in the *Sussex Clubs*, the association pays for their loss whether they be slipped, cut, or broken; and the deductions for melioration are various; the anchor being generally allowed without deduction, and the chains subject to a reduction of a third, as in the *North Shields General*, a fourth, as in the *Sussex Clubs*, and a sixth, as in the *London Maritime*, for the first five years, and one-third after that age.

*Accumulation of Claims and Running Down.*

The Lloyd's policy in case of collision, holds the damage done to the ship insured and that received by the vessel run into quite distinct and independent of each other; but it is very common in the clubs to

\* The *Jersey Mutual* have recently established a chain-testing machine, at the expense of the Association: so necessary do they consider it to ascertain that cables are trustworthy.

allow the two separate claims to be added together in order to make up the necessary proportion warranted.

*The Compensating Clause for Mixed Classes.*

In those clubs which are open to vessels of various classes, an arrangement is sometimes made, as has been already mentioned, to endeavour to equalise the risks between ships of high and ships of low value; and although it does this imperfectly it is a step towards the accomplishment of that object. Thus in the *Whitby*, the *London*, and the *Sussex* Clubs, the *West Hartlepool Mutual*, the *Newcastle Victoria*, and others, a nominal value is placed on vessels for settling Averages, of 5*l.* per ton for colonial-built ships, and 6*l.* per ton for English-built ships; and by a process similar to the inverse rule of three, a proportionate advantage is given to vessels of higher value in settlements, up to the extent of returning them the whole of the third deducted for melioration, but it is not allowed to go beyond. In the *London A 1 Club* a uniform value of 8*l.* per ton is put on the vessels; whilst in the *Topsham Club* a value of 9*l.* per ton is placed on all vessels below that worth, which I presume is intended to have a bearing not the same, but analogous to it, *i. e.*, by making the low-class vessels contribute to losses on a larger value than their real value. As I have already gone into this part of the subject at the beginning of the present division I need not enlarge upon it now: but it constitutes a most essential feature in the club system, and may be

considered the pendulum or balance wheel of the machine, by which it is equitably regulated.

The association which has given the most exact attention to compensation for mixed classes is the *Jersey Mutual*. There is a table contained in the club rules, which, although at first sight it is intricate and apparently needlessly minute, is found to be constructed in a very delicate manner: it contains two or three means of progressive compensation, and indeed comes nearer to my own idea of equitable adjustment than any other. . But it is open to the charge of being somewhat complicated; and I have already stated my views that almost as perfect a scheme of compensation can be made by an even valuation.—So difficult is it, as has been wisely observed, to apprehend simplicity.\*

Other associations seek to attain the same object by their manner of making calls. Thus the *General*

\* I may here remark of this Club that they have made, and are making, most praiseworthy efforts to attain both simplicity of action and the fullest degree of protection to their members. In their new book of rules for the present year (1859), they enter on some courageous experiments; *Ex. gra.*: foreign-going and coasting vessels are placed on the same footing; for contribution to averages a uniform value of 10*l.* per ton is given to all ships; repairs are paid in full without deduction for melioration; chains which part (after having been tested) are paid for; and in collision cases, damage done to the other vessel *and her cargo* is allowed. As an extreme case, a vessel insured in the club for 1,000*l.*, colliding another ship and occasioning the loss of both, would receive a total loss in respect of herself, and if the other ship and her cargo were of sufficient value would receive three-fourths of the same sum, viz., 750*l.* Notwithstanding the liberality of their principles, the payments for 1858 appear only to amount to about 5 per cent. on the capital of the Association.

*Sussex Mutual* divides its vessels into five classes, and calls in money to pay losses in the following proportions.—

First Class, Nominal Value 10*l.*; Rates of Calls 15*s.* per cent.

Second Class, Nominal Value, 9*l.*; Rates of Calls, 17*s.* 6*d.* per cent.

Third Class, Nominal Value, 8*l.*; Rates of Calls, 20*s.* per cent.

Fourth Class, Nominal Value, 7*l.*; Rates of Calls, 25*s.* per cent.

Fifth Class, Nominal Value, 6*l.*; Rates of Calls, 30*s.* per cent.

The *West Hartlepool* fixes the rates at 4 per cent. for foreign-going ships, and 5 per cent. for coasters, and colonial-built vessels are to pay one-fifth additional premium besides.

Two other associations have arrangements as follow:—

For class called A 1, *Colchester and Maldon Mutual* Rates, 3*l.* per cent.; *Kent Mutual*, 2*l.* 15*s.* per cent.

For class called A 2, *Colchester and Maldon Mutual* Rates, 3*l.* 10*s.* per cent.; *Kent Mutual*, 3*l.* 7*s.* 6*d.* per cent.

For class called A 3, *Colchester and Maldon Mutual* Rates, 4*l.* per cent.; *Kent Mutual*, 4*l.* 7*s.* 6*d.* per cent.

And other associations have considered it necessary to have separate clubs for the several classes of vessels; thinking it more desirable to incur the additional trouble and multiplication of books, rules and calls, to obtain a simple action, than to embrace the different classes in the same club and endeavour by a systematic arrangement to distribute the risk in an equitable manner.

#### *Wages and Provisions of the Crew.*

A distinguishing principle in club laws is that many of them admit in Average the additional ex-

penses of the crew consequent upon a ship having to put into port under Average and repair. In this, the associations assimilate to most foreign systems, which consider that from the hour a ship deviates from her course in a "*relâche forcée*,"—an obligatory putting into port,—the wages and victuals of the ship's company become extra and a loss which an owner should not sustain. Thus, some of the northern clubs state that when vessels are under Average wages and provisions of the crew are allowable in Average. Some specify an allowance of one shilling a day for maintenance, besides wages during repairs, &c. Some allow it under conditions. The *North Shields General* allows of wages if the claim is 3 per cent. independently; whilst the *Newcastle Victoria* has a rule by which six shillings per keel per spring is allowed for master, mate and boys when in dock, under Average, with four shillings additional when both masts are lifted, or two shillings additional when only one mast is lifted, for the first springs. So minutely have been considered the rates of compensation to be made to a shipowner, by men whose local and practical knowledge enables them in forming and managing a club to proportion it exactly to the requirements of the case. In this knowledge and power consists the chief strength of Local Insurance Associations.

#### *Rewards to and Dismissal of Officers.*

Many of the clubs have the wise provision of giving rewards to deserving captains and officers. This is again a stimulus which it would be scarcely possible

to carry out beneficially except in limited communities; and yet when the merits of praiseworthy masters and subordinate officers are well ascertained, it is doing the whole service a benefit to mark the estimation in which good conduct and scientific qualifications are held. And still more distinctive is the power taken by several clubs to dismiss and punish bad and careless masters. Considering that underwriters are liable for the acts of masters, and the more culpable those acts are the more direct is their responsibility, it is anomalous that they have in general no power over their own agents. The associations, however, take that power into their hands. Perhaps no club rules contain more stringent provisions in this respect than those of the *Jersey Mutual*; they dismiss captains for misconduct and intemperance; they reward meritorious masters and crews; and there are restrictions as to the age and experience of the man who is to take charge of a vessel insured in the association. The *Sussex Clubs* make it incumbent on their masters going on foreign voyages that they should have a scientific knowledge of navigation.

#### *Abandonment.*

Some of the clubs have provided special regulations in case an owner wishes to abandon his vessel in consequence of very extensive damages. The general system of abandonment I have already discussed. In some of the clubs owners may abandon, but with the concurrence of the committee. This, however, seems a useless provision, as it is like begging the question.

Another club has the same rule, but gives the owner the absolute power to abandon if the expenses amount to 75 per cent.;—and so on. In one place the clubs put on a penalty for abandoning at home of from 15 to 50 per cent. of the value. After all, the right to abandon must always turn very much on the merits of the case; and the interests of underwriters are nearly always to avoid an abandonment and sale. In clubs the principle of mutuality would rather modify the position of the ordinary underwriter in this respect.

*Missing Ships.*

The reciprocal principle of clubs makes it doubly important to establish rules relative to ships not heard of. The custom at Lloyd's is unfixed and the period before a ship is considered lost varies in every case almost according to the differing circumstances of that case. But when shipowners require to have a limitation made, not only for receiving the value of their lost vessel, but from which also to date their release from further contribution towards other members' losses, it is necessary to reduce it to a definite rule. We accordingly find regulations in all club rules to this effect; and the periods of *not-hearing* of ships approximate very closely in the associations. The most usual allowances are three or four months for the *North* and adjacent seas, and six months for the *Atlantic* and more distant voyages. The *London Maritime Association* is more defined. Its scale is, three months for the *North Sea*, five months for the *Mediterranean* and *White Seas*, six months for the



*Atlantic*, and nine months for voyages *south of the Cape of Good Hope*. On the other hand, the *Colchester and Maldon Mutual* considers all ships lost which have been unheard of for three months.

#### *Cessation of Liability.*

The cessation of a member's liability to the losses of others is various. In some clubs it dates from the time of the wreck: in others, as in the *West Hartlepool*, from forty-eight hours after wreck: in the *London Maritime* three months afterwards; and in the *Jersey Mutual* the liability continues through the whole year of insurance,—which appears to me the true principle. In missing ships, the expiration of the stated periods mentioned above is considered equivalent to the date of loss or wreck when known.

There is a distinction in the methods of various clubs for paying losses:—in some, the suffering member contributes towards his own loss,—in others, he does not. I consider the former method the more correct.

#### *Vessels Laid Up.*

The object of club rules is to apportion the true value of risks as equitably as possible. When, therefore, vessels are laid up, either necessarily, for repairs, or by option, as for winter, &c., some clubs credit the member with a return or a bonus for the diminished liability he lays upon the joint concern. Thus the rule of the *West Hartlepool* for vessels lying in safe harbour is, to keep them insured against fire and harbour risk, and to place to their credit ten shillings.

per cent. each month they lie up from the 31st March till the 30th September, and twenty shillings each month for the remaining half of the year. And the same return is made to vessels in port under repairs, provided that the period of delay is greater than thirty days.

*Manner of Paying Losses.*

I need not enter largely upon the manner in which the general body of the assured pays for the loss of a suffering member, because this part of the subject follows that to which I confine myself,—Average. It is, however, usually by holding periodical meetings; at which claims are decided on, and those properly falling on the association are massed into one sum and divided over the whole capital. A call is then made by letter on all the members by the manager or secretary, and if a payment in respect of an Average or loss is due to any member, the call is a set-off, *pro tanto*, against it. The calls are generally in the form of bills of a certain date, and if a member do not pay his acceptance, his vessel, very properly, ceases to be insured by the club. In some clubs the payment to suffering members is made in the members' bills, which I think, for many reasons, is objectionable.

*Cargo, Freight, and Outfit Clubs.*

The clubs the rules of which we have been examining are solely for ships. But there exists another class, though not so numerous, which acts as a sort of supplement to the former, and is intended to complete

the safety of the insured owner. This consists of what are named freight-and-outfit clubs, or cargo and freight clubs. Looking upon a ship not only as a valuable chattel but as a means of profit and subsistence to its owner, the loss of it must be the abstraction not only of the cost of the thing itself but also of the means whereby he lives; it is like the loss of his tools to a workman; and in the interval before he can replace his vessel by another he may suffer loss and inconvenience from it. The above-named clubs were instituted to meet this disadvantage. They go upon the principle that whether a ship be loaded or light, *i. e.* in ballast without cargo,—the owner loses something beyond the value of the ship itself; but a difference is made in the scale of repayment according as she is lost with a cargo on board or without one. This species of clubs was, indeed, instituted for a particular trade, and the associations are mostly confined to the coal ports. Colliers come loaded to the south of England and go back in ballast, with the regularity of a coach that plies between two places. Nearly half their time, therefore, they have not freight on board, although they are returning to their port in order to earn more. But whether loaded or light, expenses always attend the employment of a vessel; and although all the stores and outfit are by the strict law, and custom of Lloyd's, held to be included in the insurance of the ship, with a few exceptions, nevertheless, an owner cannot easily disconnect the temporary stores, provisions and outfit from the idea of freight, which has been called *the mother of*

wages,\* and, therefore, analogously, of those expenses which are incidental to the production of freight, and are in a similar position to wages.

These policies are stated to be against General Averages and total losses of freight. Only a limited amount is taken on a single ship. The extent of the *London Freight and Outfit Association* is 25 keels at 12*l.* per keel: equal to 300*l.* The *Equitable Freight and Outfit Association of London* extends to 50 keels at 20*l.* per keel, or 1,000*l.* The *Topsham Club*, 20 keels at 20*l.* per keel, or 400*l.* When a total loss occurs it must be shown that the owner's interest on board was really equal to the sum insured; in which case he is paid the amount of his policy. If the ship was in ballast a compensation for outfit is made on somewhat the following scale:—

If in the coasting trade . . . . .	£1 per keel.
If on voyages to the Baltic, Archangel, or Onega, and the ports between Ushant and Gibraltar, the Canaries and the Cape de Verd Islands . . . . .	£3 „
If on voyages to the United States, North America and the Mediterranean . . . . .	£5 „
If on voyages to the West Indies and Coast of Brazil . . . . .	£7 „
If on voyages to the Cape of Good Hope, Mauritius, East Indies, and all other foreign voyages . . . . .	£10 „

\* This time-honoured dictum of a great judge has now lost its force. By the Navigation Act of 1854, the dependence of wages upon freight is abolished, and consequently the maternal relationship ceases.

Thus, a vessel is entered according to her capacity measured in keels of 20 tons. If she be lost with a cargo on board she receives the full amount of insurance to that extent; if in ballast then on the above scale. If she have to contribute on freight to General Average, then the owner recovers in proportion as the sum entered in the club is to the whole amount of freight on board at the time.

This species of insurance is, however, subject to great variety. We have the principle of *pro rata* freight introduced into some of the policies,—which is a mistake; because if a ship be lost the day after she sails the whole freight which the owner would have made is as much lost to him as if the vessel had been lost the day before her arrival at her destination. Other distinctions and restrictions have been introduced, avowedly with the purpose of reducing the amount of claims and for the prevention of fraud. Thus to prevent voluntary condemnations *absolute* total losses have been strongly distinguished from *constructive* total losses, &c. Fine-drawn rules, however, are objectionable and give rise to misconception and dispute. If protection against certain contingencies by mutual insurance be sought by a number of ship-owners co-operating, let it be carried out according to the original intention. If circumstances occur which show that some members are great gainers by the mutual principle and the rest are great losers, and there is any idea of unfair dealing, let the club be broken up, and let every man be his own underwriter or insure elsewhere: *but avoid the semblance of safety*

*where it virtually does not exist*,—for such an insurance is far worse than none at all. The motto of all mutual assurance associations in which fairness prevails is, "*Mihi hodie, cras tibi.*" Casualties will run round the circle; and although it sometimes seems as if misfortune singled out one owner and let another constantly escape, this can only be a coincidence;—if otherwise, the origin of frequent misfortune to one member must lie in causes which should be examined into carefully.\*

#### *Numbers of Clubs, &c.*

In concluding this part of my subject I would point out the great prevalence of the reciprocal system on parts of the coast. In the three neighbouring ports of Sunderland, North Shields and South Shields there are no less than seventeen clubs existing. And in making the foregoing remarks I have used the rules of more than five-and-twenty associations.

Since the first edition of this work a cause has come into Chancery, in which the rights and position of an assured in a Mutual Insurance Association are involved. In *Hutchinson v. Wright* (Rolls Court, April, 1858,) a part-owner absolutely assigned his sixteen sixty-fourths of a vessel to a co-owner to whom he was indebted, and who held the remaining shares

\* It may be observed, that the great philosopher, La Place, has remarked on what are called "runs of luck." He thinks that, though to us unaccountable for the present, they should not be cast aside as *mere accident*, but noted, as they may possibly form links in the chain of some extensive law,—the footsteps of some cause with rarely observed phenomena.

of the ship. The first-named person was insured in the *Eligible Insurance Association of North Shields*, but neither party gave notice to the Association of the transaction. The ship was lost, and the Court held that the assignor could recover. From which it would appear that in spite of the "selling clause," the assignor having a good interest when he commenced his insurance, his right to recover remained, in spite of the assignment.

## PART THE SEVENTH.

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### OF ARBITRATION.

It has been seen that the policy is the instrument which represents the contract between the insurer and the assured. In its language it is obsolete, in its scope it is contracted ; it is too long to be simple, and too short to be explicit. In its continued use some expressions are conventionally allowed to be daily contradicted, whilst on the other hand a question of law may be raised on almost every word it contains. Its small base is the foundation of a thousand legal decisions ; and each new judgment delivered leaves open a fresh question. Like a piece of old china, it is venerable from the number of its mended fractures.

Occasionally, Insurance Companies in assuming it for the text of their particular contract have made a few timid alterations in its reading ; they strike out its pious expressions, and insert the Running-down clause. The Clubs or Insurance Associations have gone farther ; and although the old marine policy generally forms part of their contract, it appears to be retained mainly on account of stamp-duty, but the



"Rules" give the meaning of the mutual indemnification intended.

The claims of assured persons on their underwriters are of the most various description. Each claim is reduced to writing, and the document which sets it forth is called the Statement or the Adjustment. Formerly, before commerce had expanded into its present gigantic proportions, the assured used to make up his own claim, or get some more experienced neighbour to do it for him. Afterwards, certain persons doing business at Lloyd's became esteemed for their knowledge and experience in such matters, and to them were entrusted many of the claims to get settled. Until about forty years ago the business of making up adjustments was combined with that of an insurance broker; but at that period there was sufficient business to establish Average Adjusting as a separate profession. There is a great objection to having statements made up by an insurance broker, as there would be in having them arranged by an underwriter, because they would in either case be *ex parte*, and could not fail to be differently tinged in some degree with the pardonable and natural views which persons take who see the same object from different positions.

The persons who devote themselves to this profession are called Average Adjusters, or Average Staters. In the majority of cases they decide the questions which emerge, and they make the numerous calculations which are involved in claims on goods. The position of the Average Stater is not official or

authoritative ; and both Underwriter and Assured are at liberty to dissent from his decisions, and raise questions on each separate case. The respective rights of two parties bound by a contract so susceptible of misunderstanding as that of the policy of insurance are necessarily often ill-defined, and become the grounds of serious discussion ; and in matters relating to marine insurance there is frequently the collision of law and custom. Then there is the consideration of foreign codes and usage ; for although English underwriters are in strictness bound only by the laws of our own country, yet our system may be said to make nutations to foreign practice, which is too large and important to be ignored.

Some remedy is therefore required for the settlement of disputed claims independently of the ultimate appeal to law. In some cases, it is true, a legal decision may be the most satisfactory solution ; but as the process is very expensive, and the position of litigants generally indicates or leads to some hostility of feeling, and inasmuch as claims are very numerous—of hourly occurrence, so that it may probably be stated that a claim large or small arises upon one policy in every five effected, taking the various trades together—a constant recourse to law would be most undesirable, and must eventually overthrow the system of insurance. Such a remedy is found under the head of Arbitration. There is something quite consistent with friendly feeling in offering to leave to another's decision the opposing views which two persons have entertained upon a difficult subject. And

when it is borne in mind how seldom questions arising out of the transactions we have been considering are pure and simple, or resolve themselves into the mere form of "yes" or "no," but, on the other hand, how often little equitable rights are found on both sides and accessory matters are discovered, which have to be discussed *pro* and *con*, and all bring in their weight, it is not wonderful that arbitration has been a favourite resource, and has been a valuable reconciling medium between men of business.

*Number of Arbitrators.*

When it is determined to leave a matter to arbitration or to reference,—for it is indifferent which term is used,—the first step is to decide on an arbitrator or arbitrators. Certain qualifications are necessary in those who accept the office, of which integrity, independence, and knowledge of the subject about which the disagreement arises are the principal. It is usual either to have the case decided by a single arbitrator or by three; experience having shown that two referees, if they once take opposite views, might never be able to bring the matter to a conclusion. For as the award would require to be signed by both, that could only be done by one of the two being induced to change his particular ideas and being won over to those of his colleague. Whenever, therefore, two arbitrators are named it is always with the condition that they *may* or *must* choose a third, or an umpire, otherwise called an oversman, or by another term now obsolete, daysman. The distinction between

a third arbitrator and an umpire is this. A third arbitrator is a person who sits with the other two, and by the preponderance of his opinion brings about a conclusion; or who signs the award with one of the other referees in cases where there is an insuperable disagreement of views between the two first arbitrators and in which the submission gives power that the award may be signed by all three, or in case of disagreement by any two of the arbitrators. All three of the referees are judges and have equal authority, but practically the third gains a little more than an equal share, partly from the concession of the other two and from being the object of choice by the original referees, which selection would probably result from the greater knowledge or ability which he was known to possess about the matter in dispute.

But when an umpire is provided for by the submission it is to be in the event of the arbitrators disagreeing; and then his authority is to commence. His award, signed only by himself, will be binding, and he has to hear the evidence which is adduced by each side, although it may have been previously given to the two arbitrators. It may however be arranged by the submission that the umpire is excused from taking the evidence *de novo*, and may gather it from the arbitrators' notes. I shall have occasion, farther on, to speak more particularly of the umpire's position and duty.

Decisions by three arbitrators are much more common in cases which are not referred out of court than

those by a single referee: and this from an obvious reason, viz., the great improbability of both disputants selecting or agreeing to the same person for their nominee. There are, however, frequent instances of awards made by one referee, and matters are often referred out of court to a single barrister, accountant, &c. The practical difficulty arises out of that bias which exists or is supposed to exist in a person who is nominated by his own friend or connection in business. The man who nominates him may have already heard him express an opinion on the subject which would be favourable to his cause. Moreover, the responsibility to the single referee is greater than when he forms one of three; and supposing both parties who agree to refer a matter to him be equally associated with him by the ties of friendship or business, he may object to giving a decision which would cause one of the two to be the loser.

It becomes, therefore, an easier matter for each party disputing to name a separate arbitrator, because it does not require the assent of the opponent in doing so. It is true that in proceeding thus the character of the two referees becomes essentially changed: they are *de facto* advocates or partisans of the two parties who select them, and can only by a fiction be supposed to sit down with the same independence of thought and feeling to discuss the question in hand as if they were unprejudiced by feelings of friendship, or were not committed to some opinion previously given. But there is no valid objection to this course. The difficulty is rectified by

the appointment by themselves of a third arbitrator or umpire. When he is fixed on every question is capable of solution, because, as it will be seen hereafter, the signing of the award by two of the three is sufficient to make it complete and binding ; so that in every case the umpire can either decide the issue between the other two arbitrators, or give his casting vote on the side to which his own judgment preponderates.

The position, then, of the first two referees becomes very similar to that of advocates or barristers in court. The office of the third, or umpire, is almost identical with that of a judge. As there is no longer any delicacy in each disputant naming a person on his side whose views he already knows or suspects, the matter is likely to be sifted with the same fulness and severity as it would be in court. The whole rationale of the system of trying causes and of having them argued before a judge by counsel, who are professedly the partisans of their own clients, is this ; that men are not *all-sided* ; they cannot see *round* a subject. They may be able to acquire a very perfect knowledge of one side — one hemisphere ; they will become so impressed by what they consider the truth they have espoused that each will put before the judge or the jury one side of the contention with a completeness, an astuteness, and an eloquence which seems convincing until his adversary argues on behalf of *his* client's case as logically and as rhetorically. What then ? The practised and independent judgment of the court has had laid before

it the results of the most laborious investigation and the discoveries of the most acute eyes. It wants but this to decide according to law or equity.

Of course, on the selection of the umpire will very much depend the result of the arbitration. Each referee has liberty to bring forward names till one has been chosen who is unobjectionable. It may be said that there will still be danger of bias or partiality. Possibly so. But even granting this, can any means be shown better adapted to avoid it? Men are men; but, happily, morality and honour are well-recognised codes among the educated classes, and a love of justice to some extent seems to rule in every heart. Sometimes much good is done by bringing a matter in dispute to a close even though it might afterwards be shown that the truest result had not been arrived at.

*Arbitrators must know how to proceed.*

But another qualification required in an arbitrator, besides integrity and knowledge of the subject submitted, is that he should know the *modus operandi*; that he should be acquainted with the steps by which he is to proceed. He must, at least, know something of the office and position he takes, and the danger of making false steps. An award very laboriously made may be utterly useless through some informality or mistake. An award which was intended to avoid law proceedings may itself be carried into court and be fiercely litigated. Harpocrates must seal the lips of the arbitrator; for a single inadvertent disclosure

after an award has been made may cause the upsetting of all that has been done. It is generally desirable that the arbitrator should be to some extent practised; and he should be able to scan the proceedings with his eye, and see that all is in order.

*Legal and other Assistance.*

In arbitrations of importance the arbitrators are often attended by the solicitors of each side, and the documentation and formalities are performed under their superintendence or by them. Still, looking to arbitration as a means rather to avoid law, it is a good thing when matters can be safely left in the hands of arbitrators without other interference or assistance. A middle course is to have the documents drawn by one or more public notaries, some of whom are so much acquainted with what is necessary at all stages that they are quite depositaries of this technical learning. In some submissions to arbitration the absence of solicitors is expressly stipulated.

*What Persons may refer.*

There is hardly any limitation in this respect with persons who are interested either directly, or with powers as agents, in property or rights: and in *Goodson v. Brooke* it was held that a person who underwrote policies for another and settled losses for him had an implied authority to refer a dispute in reference to a loss to arbitration. So attorneys with a general power to act for their clients can bind them



by a reference; but if an attorney submits without authority he alone is bound.\*

*Of the Submission.*

As was mentioned when speaking of the Act of Abandonment (p. 245) it is rather the spirit and intention of the parties in correlation than forms of words which are to be considered. Indeed, a parol submission may be made, and indirect expressions may bear the construction that they submit certain matters to arbitration. But it is of great advantage to have a document properly drawn out, in which are stated the points in dispute left to the arbitrators' decision. And there is this distinction about a parol submission, that the award grounded on it cannot be made a rule of court; and there are some other inconveniences. When the form of submission is an agreement, it requires one ordinary agreement stamp if the subject-matter be above twenty pounds: and an endorsement on it to enlarge the time or for some other purposes requires a new stamp. Submissions are also made by mutual bonds with proper stamps, and under penalty; or they may be in a joint bond to the arbitrator covenanting to perform the award he shall make.

As to the immediate effect which a submission has, the mere inchoation of a reference will not bar an action brought on the subject-matter of it; nor can a provision, such as a clause in a policy that all dis-

\* See Mr. Russell's valuable "Treatise on the Power and Duty of an Arbitrator."

putes shall be settled by arbitration, deprive courts of common law of their right of judication.\* Nevertheless if the matter be somewhat advanced, and all parties have agreed to the reference, the recent Act of 17 & 18 Victoria gives power to the court in which an action is brought to stay proceedings in the suit.

It is very common in the rules of Insurance Clubs to introduce what is called the Arbitration Clause; which is a provision intended to obviate proceedings in law should dissatisfaction or disputes arise on the subject of claims. In some clubs it is even made a condition precedent to an action at law that the question have been submitted to arbitration. But there is a question how far such a clause would be binding as barring an action in law brought by a suffering member, even if he had been a consenting party to its introduction; though certainly those who make by-laws are usually expected to abide by their own legislation. But the effects of such an obstacle to a legal decision might be felt by others beyond the member who claims, individually, and the law is slow to recognise a principle that might act injuriously to innocent parties; and, also, it does not with a very good grace affirm an arrangement which apparently has a tendency to oust the law-courts of their jurisdiction. But by the case of *Scott v. Avery* the court did not object to support the Arbitration Clause which made

\* But it would appear by Lord Campbell's judgment in *Blyth v. Lafone* (Queen's Bench, Jan. 1859), that if an agreement to refer be contained in the instrument itself out of which the dispute arises, it does confer on the superior courts the power to stay proceedings in an action.

an award of arbitrators a proceeding step to a lawsuit.—(*See Appendix.*)

As the steps in a reference by disputing parties are mutual, and are, as it were, "a concession for the avoiding of strife, the matter should advance on both sides *pari passu*, and neither side is to take or receive any advantage which the other has not. The appointment of an arbitrator must therefore be notified immediately to the other side; and where the appointment is limited to a certain day the notification must be made on the same day.

It must be observed that there is a very great difference as to the degree of formality necessary to be used in submissions to arbitration when they do not take their rise *lite pendente*—out of proceedings already going on in law or equity. When both parties to a question are assured of the good faith of their opponent, and quite agree to avoid unpleasant discussion by letting the matter be settled by one or more arbitrators, a very informal manner of doing it is often employed. Thus on a policy of insurance it is common enough to write simply,—“We agree to refer all matters in dispute to the decision of A. ;” or “to the decision of A. and B., with power to them to appoint a third.” And we shall generally find that, in contradiction of the received maxim “Fast bind, fast find,” men stand to agreements more cheerfully which are protected only by good faith and honour, than they do when they are tied to them with the fetters of legal exactness. The very feeling of being bound by a multitude of words induces the

thought of escape by flaws. To put a man into prison is a tacit challenge to him to break out if he can.

But when people do not know one another well, or when there is danger of disagreement, exactitude becomes the best and shortest road to a conclusion; nothing is gained by a slipshod manner of proceeding, and it is desirable to secure every step in a formal way.

When references are made out of court, it is common to agree that they shall be made on "*the usual terms*;" or on usual terms with specified limitations. It will be of service to know what the law holds to be "usual terms," and a summary is thus given by Mr. Russell. "In such an order it is always specially arranged whether its terms are to apply to matters in the cause only, or are to extend further. Very frequently all other matters in difference between the parties are referred with the cause. In either case, by agreeing to a reference on the usual terms the parties consent that the arbitrators shall direct, whether the verdict is to be for the plaintiff or defendant, and if for the plaintiff, for what amount of damages (not exceeding, however, a specified amount) it is to be entered. They consent, also, that the costs of the cause shall abide the event of the arbitrator's decision in the action, but that the costs of the reference and award shall be in his discretion. Practically, they give the arbitrator an unlimited time for making his award. The death of either party is not to abate his authority. They agree that he shall have power to amend the record, and to certify as a judge

at Nisi Prius. They further agree to do whatever he may think fit to direct respecting the matters referred. The evidence is to be taken on oath. It *was* discretionary with the arbitrator to examine the parties: probably this term will be omitted in future, as the parties now have *a right* to give evidence. They agree, also, to produce all documents relating to the matters referred. They agree, farther, to obey his award, and to bring no writ of error, action at law, or suit in equity, respecting the matters referred against the arbitrator or each other. They consent, too, that if either of them wilfully prevent the arbitrator making an award, he will pay such costs to the other as the court shall think fit, and that if either party dispute the validity of the award, the court may refer the matters, or any of them, back to the arbitrator to reconsider. They, lastly, consent that the order itself may be made a rule of court." \*

*Of subsequent Proceedings.*

When the verbal or written agreement, the deed of reference, or the bond under penalty, has been made perfect, and an entrance is effected by any one of these doors to the business of arbitration, the matter is to proceed without intentional or unnecessary delay. In the more formal cases, and especially those referred out of court, if either party to the submission cause intentional delays, or take any step that shall interrupt the progress or defeat the intention of the

\* Russell, page 81.

reference, he lays himself open to punishment, which may be administered in two or three different ways.

As the sitting of arbitrators is a kind of little court of justice, a strict and serious procedure is to be observed, worthy of the high purpose of the administration of justice which is to be made there. The resemblance to the tribunals of judicature is stricter than it is at first imagined, although from the economic paucity of the persons taking part some of the actors appear in more than one character. The umpire is the true judge—but he is also the jury: the two original referees are associate judges, but they are also, to some extent, advocates: solicitors are sometimes really present in person, sometimes they are dispensed with; then there are the witnesses, and they are or may be examined on oath. Finally, the award itself by being made a rule of court becomes invested with a real force, such as surrounds the formal actions of equity and law.

The first necessary step for the two arbitrators who have been appointed, one by each side, is to agree upon and to appoint an umpire. In most cases where three referees are contemplated this is a proceeding necessary *in limine*; and until the umpire has been selected and has given his consent to act no other business can be done in the matter. On the choice of the third, or umpire, much depends. He should be a man of perfectly upright character, possessing a clear and logical mind, and generally acquainted with the subject-matter of the questions to come before him. It is not to be insisted that he, or either of the other

two arbitrators, is to be without interest in the result of the arbitration. This could scarcely be in practice, for men of business are so affected, directly or indirectly, by decisions for or against their cotemporaries, that there are few who are not entangled in the web. When the important fact of the umpire has been decided his nomination is written on whatever instrument may be the formal submission, and then it is to be communicated to himself, and he must signify his consent to act with his co-referees in the business.

At the first joint meeting of all the referees they will take the initiative by reading the agreement or other form of submission under which they are appointed; they will observe the number and scope of the points submitted to their decision, and the powers conferred upon them. It is of the utmost importance that arbitrators should not travel out of the record, or introduce in their award questions which have not been left to their adjudication. They will take notice how the costs in the suit (if there be one) and the costs of the reference are to be dealt with: they will see what limitation of time is made for them to perfect their award, and what liberty they have to enlarge the time, if insufficient. If the submission be in very general terms, so as to leave "all matters and questions between the parties" to the decision of the arbitrators, it will scarcely be possible for them to exceed their jurisdiction. And so much deference and consideration is usually shown to the arbitrator's tribunal by the judges and courts, so beneficial is it felt to be that questions relating to property and com-

mercial matters should be settled in a quiet and non-legal way, that a liberty is allowed to arbitrators which does not exist in more solemn tribunals; the referees are allowed to wander at pleasure through the domains of law, equity, civil and commercial canons and their own notions of abstract justice; to decide on motives, and trace out rudimentary intentions, with a freedom which could not be permitted to regularly-constituted courts. Even though the arbitrators' decision go beyond or against existing laws, yet if it be arrived at in *bonâ fide*, and its result is not mischievous but beneficial, the utmost leniency will be shown towards an award thus characterised, its irregularities will be condoned and its extra-legal flights be supported. With a sort of parental indulgence, Westminster Hall and Lincoln's Inn encourage in these imperfect benches a latitude which they are themselves denied. But this concession to the acts of arbitrators, having a design to facilitate the arrangement of differences between contending parties and to prevent every pair of disputants from rushing into the legal forum, must not encourage rash views or laxity of procedure on their part. They are bound to proceed to the best of their ability, with care and caution, according to established formulæ, and in concurrence with such precedents and decisions as they can discover; for it is certainly not the way to bring a dispute to an end for the referees by blunders or laches to leave the result open to be ripped up by either of the contending parties.

As the arbitrators will be careful to confine them-



selves to the subject-matter left to their decision, so they will carefully observe the dates between which their arbitrament is limited: and unless there is something in the submission which relates to prospective claims, interest, &c., they will not exceed the question as it stood on the day on which the submission was signed. Nevertheless, it may well be left to them to calculate interest up to the time of the award being signed or paid, or to deal with events which were impending, but not matters of fact, at the time of the signing of the submission, if so intended by the contending parties. And as to the costs of the arbitration itself, they are necessarily future and yet must be dealt with. These are, however, rather an incident of the matter submitted than any additional matter, and are, therefore, not much in point.

These preliminaries being settled, and the three arbitrators having met together on an appointed day in a place agreed upon, notice of time and place having also been given to the parties concerned, the arbitration commences. It is begun without form or ceremony. If counsel or solicitors attend, they may indeed think it necessary to proceed *secundum artem* by opening the case and stating the facts on either side in a speech; but when the matter lies entirely with mercantile men, this is dispensed with, and an immediate inquiry is made as to the question which the parties have in discussion.

Yet though the place of meeting be at the office or rooms of one or other of the arbitrators, or at some tavern or public room, and the proceedings be divested

as much as possible of superfluous circumstance, it must be remembered that the arbitrators' chamber is nevertheless a miniature court of justice, and the proceedings though not having a legal appearance should at least be regular and businesslike. I have already alluded to the practical bearing of an arbitrator being chosen on each side of the question. As there can be no objection made on the part of A. that the referee named by B. is B.'s friend, and had heard a great deal of B.'s side of the dispute before his appointment, and *vice versa* as to the other side, so it must necessarily happen in many cases that one arbitrator comes well-informed on his nominator's views and objects, and the other comes equally prepared on behalf of the person's interest from whom he received his appointment. And thus little time need be lost; the one referee is able to give a clear and forcible account of the transaction *ex parte*, showing the grounds of his nominator's contention, and the second arbitrator shows the causes and reasons against what has been put forward, or sets out his nominator's claim, and so the matter is fully stated for the information of the umpire, and is ripe for an entrance into the documentary and *vivâ voce* proofs. Only it is to be remarked, though this siding of the two first arbitrators is a fact the origin of which is in human nature, they are not to forget their character of judge, whilst it may be convenient in the outset for them to speak somewhat as advocates. They will do violence to their simple predilections and prejudice, and open their ears and stimulate their judging powers to give

a fair and impartial consideration to the facts as they will be discovered as the arbitration goes on. If they do not do this they are ignorant and unworthy of their office; and should one or other of them exhibit by his words or gestures gross partiality or a predetermination to wrest the cause to his side, it may offer fair ground for the parties revoking the authority given to the referees, and so stopping the arbitration from proceeding.

The greatest fairness therefore is to be studiously observed. If it be possible, both parties should be present or represented whenever evidence is given. All that either party has to say should be said not privately to one of the arbitrators, but openly at a sitting of the referees. I do not mean to say that during the pendency of an arbitration a referee may not converse with his nominator or gather information for his own guidance on subjects connected with the matter in hand. For these little courts of judicature are eminently practical in their character, and seek to arrive rapidly at correct conclusions, and not to exhaust themselves with technical difficulties and restrictions.

The evidence is taken in the usual manner, and the witnesses are examined either on oath or without that solemnity. Arbitrators have power to administer oaths to witnesses, but it is not invariably done; for it frequently happens that both parties to a reference are satisfied with the mere assertions of the persons examined; and this may the more often be the case on account of arbitrations being resorted to very much

in questions relative to custom of trade, state of account, usage of Lloyd's, &c., when the facts are not so much disputed as is the practical bearing of certain speculative principles. It is also frequently left to the opposite parties to the arbitration to produce evidence and witnesses in support of their case, but when a reference is made by rule or order of court the attendance of witnesses is rendered compulsory by an Act passed in the third and fourth years of William IV. It may be added that, again, in regard to the oath the arbitrator is not bound to use any specified form in administering it.

In proceeding with the award the arbitrators should go on with due diligence, yet not with unseemly haste. It is a gratification to most persons to be allowed to say out what they have to say, and to be listened to with attention. Arbitrators should not go to a conclusion *per saltum*, but hear what each side has to adduce. Mr. Russell, in the Treatise already mentioned, recommends "as a general practice, that the arbitrator should carefully take notes in writing of everything material stated by the witnesses, in order that he may be enabled to do full justice between the parties, by going over the whole collectively and deliberately, by accurately comparing what a witness says at first with what he admits on cross-examination, and what one witness states with what a second witness deposes to. Even if the case is so short that the arbitrator can safely trust to carrying all the evidence in his head, it is advisable that there should be written minutes of the evidence in case any ulterior

proceeding be taken on the award, and the arbitrator be required to give information respecting the proceedings before him." (P. 189.)

*Limitation of Time.*

It is important and desirable in most cases that an award which is to put an end to strife should be made within a reasonable time. There are other obvious reasons where the time should not run on indefinitely, such as the chances of the death or the solvency of parties, the fluctuating value of property, the interest of money, and the like. It, therefore, forms part of many or most submissions to appoint a fixed time within which the award must be made. But it is a mistake to suppose that a limit of time is invariably necessary. Its introduction is optional, and, on the whole, advisable. If no limitation be made in the submission the power of the arbitrators is abrogated by the following three acts; viz. the making of the award, the revocation of arbitrators' office and powers by one or both of the parties, or the death of the arbitrator. In common law, set limits have been fixed as to time. In other arbitrations, if a limitation of time have been made in the submission it must be adhered to, and it is as binding on the arbitrators as any other condition would be.

But the restriction as to time introduced in the submission is usually accompanied by a power granted to arbitrators that they may enlarge the time if necessary: so that it does not seem to amount to much. That power must only be exercised during the cur-

rency of the functions of the arbitrators as originally prescribed ; *i. e.*, neither before they were actually empowered, nor after the limited time has expired. Thus, as to the wrong exercise of the power by anticipation ; if the appointment of a third arbitrator, or umpire, be a condition precedent to making the award, the enlargement of the time cannot be made by two out of the three, it must be made after the appointment of the umpire. The power to enlarge is lost if the arbitrators suffer the last day originally named to slip without writing on the submission that they enlarge the time ; and although the power of the arbitrators may seem to revive by both parties to the reference agreeing after the expiry of the original time that there should be an enlargement, it is virtually making a new submission, and necessitates a fresh stamp.

As to the form in which the enlargement is made, it is immaterial ; and it has been held that a verbal enlargement made by the arbitrators and not dissented from by the parties was a valid enlargement ; but in general it should be made in writing. A power once given to enlarge the time may be exercised by the arbitrators in a succession of acts, it is not confined to one performance. In cases referred out of court, the court can itself enlarge the time, even though the arbitrators do not do so. Mr. Russell quotes an authority in stating that when " months " are only spoken of for limiting time without explaining what sort of month is intended, *lunar months* are to be taken. I confess I feel some doubt about this ; since in common parlance when we mention months we

are generally understood to mean the months of the calendar.

*Arbitrators' Powers rescinded.*

The powers of the arbitrators may be revoked and annulled by the withdrawal of the authority by the parties to the submission. This may be rendered necessary by the arbitrator showing himself an unfit man, or that he is actuated by private and personal motives. But by the Act 3 & 4 William IV., when a submission is made a rule of court, a revocation by one of the parties will not be allowed unless by leave of court. And the reason for this is, that the power in the referring parties to revoke has been much abused. It was an easy escape for one of the two referring parties, the one who discovers through some channel that the award is to be made against him, to revoke his authority and thus stultify the proceedings and prevent an award being made.

When a female is party to a reference her marriage revokes the authority she had given to the arbitrators. This is on the well-known principle of the female's individuality merging, by marriage, in her husband; and it acts as her death would do. The death of one of two parties to a reference will dissolve the arbitrators' authority and terminate proceedings, unless this contingency has been specially provided against in the submission. The death of one of the arbitrators would in general practically revoke the powers of the remaining two; and, as in the case of the death of a juror, proceedings must begin *de novo*: for all

the arbitrators must be cognizant of all the evidence and case equally. The bankruptcy or insolvency of either of the parties to the reference does not necessarily revoke the arbitrator's authority.

“ When one submission includes several parties on the same side, who have each of them separate interests, the death of one avoids the submission only as to him. Thus when the owners of a ship and the several freighters, who had distinct interests in the cargo, submitted some differences which had arisen to arbitration, it was holden that the death of one of the freighters before the award made affected it only as to him, and was no revocation as to the others.”\*

*Inquiries by Arbitrators for their own Guidance.*

The particular selection of an arbitrator is usually on account of the knowledge of the subject in question which he is supposed to possess, or from the integrity of his character. It is very possible for a man to be upright and to have a fair general acquaintance with the subject in dispute, and yet require technical information on certain points. These may not be questions of fact such as are put in evidence, but opinions, and the results of personal observation through a course of years, or other information which the arbitrator finds necessary to form his own judgment. No doubt he is at liberty to avail himself of all means of information within his reach, and to make exact inquiries when his own knowledge is insufficient. Besides the evidence relating to facts, he

\* Russell, page 167.



may confirm or modify his own views by having recourse to books and skilled persons. At the same time, whilst availing himself of their knowledge and views, he is not to delegate his own office, that of judging and determining, himself, the points submitted to him. Nay, arbitrators must not delegate their personal authority even to each other, although one of them be eminently qualified from his knowledge to almost decide the point. Thus, suppose in a shipping case two merchants were to call in a third on account of his special knowledge of the subject, as, for instance, a shipbuilder on a point of construction, or an ex-ship-master on subjects of navigation, &c.; yet the other arbitrators must not place the decision of the question in his hands when he is only a third assessor, although they would do so if he were an umpire. Nevertheless, they would be very much guided by the views stated by the third arbitrator, but the principle of a joint conclusion is to be upheld.

*Umpire.*

The distinction between an umpire and a third arbitrator has already been briefly alluded to. Whilst a third arbitrator assists the other two, and his vote or opinion will make a majority where there is an insuperable difference between the first two referees, an umpire is clothed with independent powers and has a separate action. He is to decide alone, should the arbitrators differ. A third arbitrator reconciles the discordant views of his colleagues, or decides between them; but the umpire decides between the original

parties to the reference. He has to begin the case again, he examines the witnesses himself, except when the parties agree that he should take the evidence already collected by the arbitrators, from their notes ; he makes his award without reference to any which the arbitrators may have drawn, and his award is to be complete, and to comprehend in itself all the points in dispute, although upon some of them the two arbitrators were unanimous.

It appears that the appointment of an umpire by parol is sometimes sufficient, although I must add that, in all cases when proceedings are already by documents it is safer and more conclusive to have written evidence of his appointment, and, indeed, to have documentary proof of all steps in the business. If the deed of submission to two arbitrators be silent as to the appointment of an umpire, the present law gives the power to appoint one themselves ; but if the submission contains any provision on that subject they are not permitted to run counter to it.

*Regularity of Proceedings and the Reverse.*

Propriety and regularity must characterize the proceedings of a reference. There must be a careful attention to perfect justice and impartiality towards all parties. The referees require to bear in mind that their office is to terminate contention ; also, that it is not a difficult matter to upset an award on the score of irregularity : and therefore it is their duty to make such an award as will be good and consequently effective,—otherwise all their labour may prove not only useless but mischievous.

With an eye to such exactitude the arbitrators will only take evidence when both parties are present : this gives the opportunity of cross-examination, or at least a rigorous investigation. But then it is not permitted to one of the parties who have signed a submission to act vexatiously or to frustrate the justice which would be done, by absenting himself from the meetings after having been duly notified of them. Should he do this the arbitrators will give the absentee notice of their intention, and will then proceed with the reference without him. Such proceedings are called *ex parte*.\*

Should the arbitrators, without bad intention, deviate somewhat from regularity, so that, in consequence, their award might in strictness be set aside, the prejudicial effect of such irregularity may be done away by the sanction of the parties to the reference, and this either by word, or even by such conduct as is significant of their assent to the irregular course of the proceedings.

#### *Drawing the Award, &c.*

When the arbitrators have come to their decision on the one or several points submitted to them, they put the results of their judicial inquiries into a form called the Award. This is either drawn by a solicitor, a notary, or in many cases it is done by themselves.

\* In *Tryer v. Shaw* (Exchequer, May, 1858), where one party to an arbitration went away prematurely, under a mistaken supposition that there would be notice of another meeting, and the arbitrator made his award *ex parte*, the Court would not disturb the award.

When a solicitor or a notary is employed to draw the award it should not be the same person who drew the submission, inasmuch as his being acquainted with the beginning and the end of the transaction would be putting a power in his hands which might be turned to an improper purpose ; and until an award is taken up and published secrecy is all important. If the reference was to three persons all are to sign the award. They are to sign it together at the same time and place ; the principle of unity of opinion and action is to be maintained to the latest.\*

But one of the arbitrators may entertain so strong a feeling against the award that he may refuse to sign it. That case is usually provided for by the submission containing a provision which allows any two of the arbitrators to sign the award ; so that the award may be good and binding although only two out of three signatures are appended to it. If, however, the submission do not contain this proviso, the award would not be valid unless coterminously signed by the three referees. If one of the arbitrators stays away from the place where the other two are met to sign, due notice must be sent him of the intended meeting ; and then, if he persists in segregating himself from his colleagues, the signatures of the other two will be enough to give force to the award.

\* But in *Anning v. Hartley* (Exchequer, Jan., 1858), the Court upheld an award in spite of some irregularities in signing and taking evidence, but involving no misconduct of arbitrators : and it preferred sending it back to the referees for rectification. And in doing this it was held that there was no necessity for notices to the parties.

When the award is once signed the arbitrator's power ceases. He cannot amend his award or add anything to it. It is, as it were, out of his reach, and he may not even correct clerical errors in it,—not even such a mistake as gives to the writing a meaning directly opposite to that which the arbitrators intended it should have, and which error could be clearly shown to be one.

The award must embrace and deal with all the points submitted to the arbitrators. It must not decide questions not left to the arbitrator's judgment, nor give a decision apart from the question submitted. Thus, in a rather recent boundary question, when it was left to the King of Holland to decide whether the boundary was to be a range of hills, A, or a range of hills, C, and the royal arbitrator decided as to neither of them, but named a third and intermediate line, B, for the boundary, his award was rejected, because it was not left to him generally to state where he thought a boundary should be, but only which of two lines he adjudged to be the boundary.

“The award must always go to the point in dispute, and is not to substitute some other alternative as a settlement of the question.”

I am obliged, however, to state that there is a good deal of conflict in the judgments relative to awards; so that after having apparently distinguished a principle, there is found to be a deduction from the certainty by one or more decisions opposing the general doctrine. Thus, though I have mentioned above that it is out of the power of the arbitrators to alter or

correct an award once complete, yet we shall hereafter see that under certain circumstances awards are remitted to those who made them, for emendation. Again, although it has been shown that anxious care is necessary to guard against error, excess, or defect in the award and, indeed, in each step of the proceedings, yet such leniency has sometimes been shown by the Court respecting small errors committed in drawing an award, as to give one the impression that these little mistakes do not interfere with the substantiality of the award. Mr. Russell says on this point, "A close examination of the cases compels one to say that one uniform principle has not been adhered to as to the consequences of a mistake. Greater latitude was allowed formerly in reviewing the arbitrator's judgment than the courts would be disposed to admit at present." So, in general, errors appearing on the face of an award will cause it to be set aside; yet in a very late case\* where there was an omission made in respect of the costs of sending the award back, the court supported the award, and would not suffer it to be quashed by an error that lay, as it were, on the surface, and did not go to the subject-matter so as to taint that.

Nevertheless, I think we may say that a gross error should affect the award, particularly if the arbitrators themselves admit that they were misinformed or otherwise mistaken. On the other hand, decisions might

\* *Bell v. Postlethwaite*, (Queen's Bench, 1856). And in *Kendil v. Merrett*, the Court went so far as to alter the Order of Reference after the Award had been made.

be quoted to show the disinclination which courts of law and equity have to disturb awards when made; and they shelter themselves under the assertion that courts have no jurisdiction to correct the mistake if there were one. If this assertion proceeds from the notion of arbitrators being, *pro tempore*, a sort of judges of Nisi Prius, the delicacy seems to me overstrained, because the decisions of regular courts can be appealed or carried into other superior courts; and, much as the system of arbitration is to be upheld as a less expensive method of ascertaining and enforcing rights, yet this would be to erect the arbitrator's court to a position superior in this important respect to that of the regularly-constituted tribunals.

There is no disposition among judges now to increase litigation. There was a time when the unwholesome system of allowing judges to receive remuneration by fees led, as a natural consequence, to the desire to draw the largest quantity of business to their courts, and, conversely, induced a great jealousy of any attempt 'to oust the courts of their jurisdiction.'\* With a fixed stipend, and that immaculate character which happily invests the judicature of this country, no such desire to increase litigation

\* It is certain that in former times a stronger suasion even than fees was used with judges. There were secret gifts,—such as eclipsed the glory of the great Lord Bacon. Allusions both to fees and bribes are to be found in the cotemporaneous literature. Thus Jeremy Taylor, in the seventeenth century, says, "And some judges have lessened themselves by fear and cowardice, by *bribery* and flattery, by iniquity and compliance; and where they have not, yet they have notices of few causes."

now exists in the minds of judges. They find labour enough in disposing of the business which necessarily comes before them, and are sincerely desirous to see contentions between parties arranged by arbitration or any other means outside the walls of the court. They, therefore, give the utmost encouragement to what has been called the domestic tribunal; and in the case, lately tried, of *Scott v. Avery*, allowed a club rule to have effect, although that rule made arbitration a condition precedent to legal action,—a previous step interposed, on which the strife might frequently expire.

Therefore it is that the losing party cannot appeal to a court of law or equity from an award of arbitrators. Courts will not take cognizance in that manner. Flaws may be found, the regularity of proceedings may be impeached, and grounds may be established by which the award may be upset. But the chain which a disputant himself placed in the hands of arbitrators, if once properly fastened round his neck, courts will not unshackle. A court will, however, go to the extent, having first the consent of both parties, of inquiring of the arbitrator the grounds of his decision. If it were found then that it had proceeded in some gross error or misapprehension, I conceive it might lead to the award being quashed.

With the same view of the desirableness of supporting awards, the court will dissect the arbitrator's written decision, and separate the good it contains from the bad. So that, like some other documents, an



award may be good in part and bad in part ; and the circumstance of its mixed character will not by necessity defeat the whole instrument, but the portion which can be sustained will be severed, and will have force.

An award is, notwithstanding its privileged character, not indestructible : and it may be bad enough in itself to be set aside ; as if, for example, it be proved that a fact submitted is not decided by it. It is obvious that a procedure which is intended to be an end of controversy must not itself be vague, incomplete, or indefinite, for in such a case it fails signally in its primary intention and its beneficial use.

#### *Form of the Award.*

As to the form in which the award is given, it is as various as the forms of submission, or the course of the proceedings. It is regulated very much by the circumstances which gave birth to it. It may be by parol, or, if written, it may consist of a few words signed by the arbitrator or arbitrators without preamble. On the other hand, the submission may have been exact, the reference may have been out of court, the arbitrator a barrister, the subject-matter intricate, the disputants angry, solicitors may have attended the proceedings, and counsel been heard at the meetings. In this case the award will of necessity require to be all-fours with the preceding steps in form and exactness. It will be introduced by a preamble which will specify the matters in difference left to the arbitartor's decision. " Any provisions of the submission which

are necessary to warrant particular directions, as, for instance, respecting costs, or saying what should be done, ought to be set forth. It is not necessary that the award should specify what the matters in difference are; but as questions difficult of proof may sometimes arise long after the award has been made, whether certain matters were matters in difference at the time of the submission, it has been recommended as a convenient course in many cases that the recital should specify the subjects in difference, and that the disposing part of the award should refer to them; because in an action subsequently brought on any of the matters referred, the award would then give a complete and indisputable defence.\* After such a preamble the arbitrators will probably for their own justification and for the support of their award, declare that they have made it "of and concerning the premises."

But it is not even imperative that the award should be made in writing, unless so specified in the submission. It may be delivered by word of mouth and yet be valid. This kind of award, however, will rarely be advisable; and as words uttered may be misunderstood or misreported, it will be generally the desire of the arbitrator as well as the parties submitting, that the exacter method of writing should be used; nay, the litigants would consider a written award their due, though not specified in the submission.

If the award be formal, or likely to be brought into court, it is incumbent that it should be stamped. It

\* Russell on "Power, &c., of Arb.," 252.

is not necessary, however, that it should be written on stamped paper,—it may be stamped at any time subsequently.

*Of Publication and Delivery.*

It is often a stipulation that the award shall be published. Whatever may have been the original of the word “publication,” a very limited publicity now suffices. Any act that can be called public, after the award is made, will fulfil the condition,—such as reading it over to the persons who attest the arbitrator’s signature. The publication is the completion and termination of the arbitrator’s functions, and it may sometimes, for certain purposes, stand in lieu of notice and delivery to the contending parties.\*

To avoid the stamp duty or from other motives the arbitrators sometimes give a *certificate* instead of an award. This is rather substituting one form for another than effecting any material object.

The award being thus completed, it remains that it be delivered into the hands of the parties concerned. The arbitrator keeps possession of the award and documents until the costs of it are paid to him :

\* Lord St. Leonards, in his “Handy Book of Property Law,” published since the first edition of this work, alludes to *publication* in the case of wills. He says that the necessity for publication of a will has been taken away by the late Act, and that before the recent enactment the word had no precise meaning. What he adds is very memorable: that though “publication” of wills was abolished, yet so inveterate is habit, that the word “republished” has found its way into the Act itself. And no doubt the publication of an award is a thing of the past, and only lingers among us like other superstitions, *which we disbelieve and fear.*

for it is doubtful whether he have a legal remedy for the fees after having parted with the papers. Theoretically, it is immaterial which of the two contending parties takes up the award by paying the costs and carrying away the documents ; for neither can alter it, and both are bound to abide by its contents. Practically, however, it is convenient that the gaining party should have possession of that which will be his weapon. The other side would indeed not procure eventual good to himself by concealing or destroying the award already published adverse to his interests ; but independently, the manner in which the payment of costs is arranged by the arbitrator is generally such as to contemplate the gaining party handing the fees to the referee : and they seem to come with greater propriety from the side which receives advantage by the adjudication. In order to secure this end, a slight artifice is used,—one perfectly innocent and well intended. Notice is sent to each party that he can have the award upon payment of the fees ; but the notice to the party who would properly take up the award is usually sent in advance of the other, so as to render it probable that he will be the first to apply for its delivery. Should, however, the unsuccessful party come first for the award, an unstamped and unsigned copy may be given him, and the stamped and signed copy be kept for the winning party.

#### *Of Costs.*

The questions relating to costs which come before an arbitrator are comprised under three heads :—

1st. Those which relate to the litigation, when a cause has been referred out of court, or by litigants themselves to end the strife. They are called *Costs of the Cause*.

2ndly. Those which are incurred in the proceedings of the arbitration itself; the submission, the attendance of witnesses, &c. These are called *Costs of the Reference*.

3rdly. Those of the arbitrator for his own remuneration, drawing the award, &c. These are the *Costs of the Award*.

And the following courses may be taken respecting costs in submitting matters to reference:—

1st. The submission may be silent as to costs.

2ndly. The submission may give the arbitrator power over part of the costs, or the whole.

3rdly. It may prescribe definitely as to costs.

4thly. It may direct that the costs shall “abide the event.”

With respect to the first of these positions, when the submission is silent as to costs the arbitrator may be silent too. The result of his decision decides also the costs of the cause, if the matter is one already litigated. The costs of the reference are disposed of by each contesting party paying his own costs; and the costs of the award are to be equally divided between the parties submitting.

In the second case, when costs are left in the discretion of the arbitrator, he not only may, but must, decide upon them in his award. They are then in

his power entirely, with certain legal limitations ; and he can, where necessary, include in the costs those of making the award a rule of court. It is said that he ought not to adjudicate as to his own fees : but this seems practically a needless piece of delicacy ; for he will decide in some form. They will necessarily enter into his thoughts in fixing the final sum to be paid by one party to the submission, and he is careful not to allow his award to be seen until the costs of it are paid to him. In fixing the onus of paying the expenses of the reference, (that is, the expense attending the arbitration,) and of the award, the arbitrator will be guided mainly by the consideration whether the opposition of one party was groundless and vexatious, or whether, although the cause might be decided entirely against one party there were sufficient circumstances adhering to the subject to give him a *prima fronte* right to have the matter referred ; thus justifying him in his delay and the necessary expenses incurred.

Thirdly, when the submission prescribes definitely as to costs the arbitrator is saved the trouble of that part of his duty. His care in this case will be not to interfere with them, farther than in fixing his own and procuring payment of them.

Fourthly, if costs are directed in the submission to "abide the event," the question remains what is "the event" intended ? Generally it means the abitrator's decision. But it requires a distinction to be drawn when cases are referred out of courts of law :—as when instead of the jury finding a verdict the cause is

interrupted and is referred to an arbitrator. Sometimes not only the special part of a dispute concerning which part a trial took place, but all the questions and differences between the contending parties are left to him; and his finding on the whole case might be different in result from his finding in respect of that portion where his decision is equivalent to a verdict.

#### OF THE ENFORCEMENT OF AN AWARD.

However desirable arbitration may be shown to be as a substitute for litigation, it would lose its value, and indeed must fall into disuse, unless there were means at hand for enforcing the award when made. For although in some cases the parties to a reference would abide its consequences and perform the directions of the arbitrator without demur, other persons disappointed or indignant at the award being adverse to them would seek to evade it, or throw obstacles in the way of its fulfilment. There is a latent hope in the breasts of most people that results may prove favourable to themselves: indeed, it has been said that the best proof of the correctness of an award is the *dissatisfaction* of both the parties concerned in it at the result. It therefore requires that the domestic tribunal should be backed by the strong hand of the law, either by its actual interference, or by the moral support given by a known power of access to it.

And the methods of enforcement both in law and in equity are numerous and easy. I propose in con-

cluding this chapter to give a short account of them. It must be remembered that these means are not themselves part of the proceedings of arbitration, and in point of honour ought not to be required to be resorted to. Before being adopted a reasonable time should be allowed to the losing party for performing the award, after which he may be held to the mutually-signed agreement by legal proceedings.

The most obvious and usual mode of enforcement is an action at law. This can be brought upon any award whether the submission contained a provision for making the award a rule of court or not, or if the matters were submitted by parol. The particular form of action, whether of debt, assumpsit, on case, or of covenant, will be determined by the particular circumstances and the recommendation of the party's legal adviser. But an action at law may be also resorted to by the losing party as against the enforcement of the award; although, I imagine that, in the majority of cases where rights and property are affected by the arbitrator's decision, an injunction in Chancery would be the more efficacious remedy to prevent its course. A few years ago, the dilatory state of proceedings in equity prevented many persons from resorting to that forum where time was of consequence to them; but now, from the great acceleration of business in those Courts, that objection is removed, and a less expensive remedy is obtainable.

When proceedings are brought in Chancery they are by bill, or by motion. Although the court would



not be made an instrument to enforce an unrighteous or erroneous award, it will take a view possibly differing somewhat from that in which the common law regards the subject, and it will not refuse to lend its aid because an award may seem to be unreasonable; for it considers that great and binding powers are voluntarily conferred on arbitrators by the parties in dispute, *proprio motu*. Nor will the action of the court be prevented by the knowledge of proceedings in common law being taken simultaneously but having a specific object; such as an attachment against the person of the defendant to compel him to perform some act or obey the award.

When the submission has been made a rule of court an attachment will lie against the losing party to an award who refuses to perform it, on the ground of its being a contempt of court: and this both in law and equity. Attachment is the severest method of dealing with an award: and when this course is pursued it is not permitted to a party to seek to enforce his award by action at the same time. By an attachment the party in contempt is thrown into prison, where he will remain until by payment of the award or other performance of it he gets relieved.

The other forms of proceedings on an award are by execution, by pleading it, or producing it in evidence, &c. Thus an award can be supported; and the same means become also the weapons for resisting the claims of the person in possessing the award. Except when an action at law is founded on an award, for then it does not require it, it is neces-

sary to make the submission a rule of court. There is no restriction in point of time for taking this step, and it may be taken indifferently by either party to the arbitration. A submission may also be made a rule of court under the Act of 9 and 10 William III. It may be procured both in term and in vacation.

When the party to an award who is the loser resorts to law to set it aside or protect him from its effects, it requires, if his complaint be of the corrupt practice of the arbitrators, that his application to the court should be made within a certain specified time after the award has been *published*; the period allowed being such as to give the complainant an entire clear term after publication. This publication we have seen is the finishing stroke of the arbitrator's or umpire's office; it is a mere technicality, and is similar to the "sealing and delivering" of a deed,—a form only.

As the views of courts of law and equity are now to support awards whenever they can, they often refer them back to the arbitrator instead of setting them aside altogether. Indeed when an award is good in part and bad in part, the good part is often culled out, and the remainder becomes inoperative. The award is frequently referred back to the arbitrator when some error or omission appears on the face of it. When it is thus sent back to the arbitrator for emendation, his power revives, and sometimes it is his duty to hear evidence again *ab initio*. In other cases the arbitrator need not examine witnesses. In subsequent proceedings upon an award the arbitrator

himself may be called as a witness in reference to facts relating to it or the parties ; but in no case is he to be compelled to state his chain of reasoning, or the motives on which the conclusion was built which was embodied in his award. The mental process of the arbitrator is ever to be inviolate.

This tenderness of treatment where the arbitrator himself is concerned throws some light on the manner in which the system of arbitration is viewed by the formally-constituted tribunals. First, it would be inquisitorial to demand of one, invested, as it were, for the hour with the judicial ermine, his inmost thoughts of which his award was the manifestation. And secondly, it would be productive of endless disputes and litigation were the parties allowed to track their judge *pro tempore* in his ratiocination upon the questions they had left to his decision. Although in cases referred from the court the arbitrators are most frequently members of the bar, yet in mercantile and agricultural disputes the reference is generally made to a layman, a person intimately, because practically, acquainted with the matters in discussion. Such men have methods of arriving at truth unlike the logical forms by which strict reasoning is guided. Unversed in the 'bookish theorick,' they are led to conclusions rather by an instinct or intuition, which in many instances shews itself to be a trusty guide. In other words, tact, experience, and knowledge of mankind lead them to an end which is right ; even wrong reasoning oftentimes directs men, as it is said to do women, to correct conclusions.

It would therefore be altogether unwise to lift up the veil, or to show the quaint processes of the workman's art. The jealousy which once prevailed in the minds of judges of the interference of lay tribunals, no longer exists. Within a few weeks of these remarks being written this fact was re-affirmed by the observations of Lord Campbell in delivering judgment in the House of Lords in a case which involved the subject of arbitration.\* His Lordship in support of the validity of an Arbitration Clause in the rules of a Marine Assurance Association said, "What pretence was there for saying that because this association wished to avoid being distressed by continual actions, and preferred referring disputes to a domestic and private tribunal among themselves, that they had no right to do so? That would be most inexpedient, and would be a violation of the liberty of the subject. He (Lord Campbell) could see no ill consequences, and he saw great advantages, from the practice. He knew that great obstacles had been thrown by the courts in the way of proceeding by arbitration; but with respect to his learned predecessors, he would let their Lordships into the secret of their doing so. There was no disguising the fact, which was, that formerly the chief part of the judges' salaries depended upon fees, and there was a great desire, therefore, to have as much business as possible brought into Westminster Hall. One description of procedure took causes into the Court of Queen's Bench,

\* *Scott v. Avery*, Writ of Error, House of Lords, 10th July, 1856.

another into the Common Pleas, and a third into the Exchequer,—but arbitration took them out altogether, and therefore robbed the judges.”

By the maintenance, where practicable, of awards, it is important to observe that the judges, the exponents of the law, do not encourage a litigious spirit. They see in the course of their daily task too much of the selfish contentions of mankind, too much of the pugnacious side of human nature, to wish to add to or foment strife. They would rather see it set at rest by the intervention of friends or by the self-constituted and prompt tribunal of the arbitrator's chamber. When therefore it becomes necessary absolutely to set aside an award, it indicates some glaring and essential error, or some fraudulent procedure, or some incompleteness in itself which renders the award inoperative.

Against misbehaviour of the arbitrator, in many cases the only remedy is by bill in equity;\* but in all cases where the submission has been made, or can by its provisions be made, a rule of court, the Statute of William III. provides for setting it aside on complaint. There may be legal misconduct in an arbitrator when no moral wrong is attributed to him. He may have overleapt rules and committed solecisms in practice which it would be impolitic in the judicature to overlook, for they may have had an injurious effect on one of the parties concerned. For a mere or solitary mistake of the arbitrator the courts would probably not interfere to set aside the award; they

\* Russell, p. 634.

would possibly send it back to be amended. But an award might be set aside for more essential vices : as its being made after the time to which the arbitrator's power extended ; irregularities in taking the evidence ; when the arbitrator exceeds the authority confided in him ; where the award is of such a character that it does not settle and conclude the questions sought to be decided ; and when the award is substantially inconsistent and repugnant. And Lord Eldon, quoted by Mr. Russell, said of the Act of William the Third, that though the Act was silent as to mistake or error of the arbitrators, "yet it is now settled that an award may be set aside from error or mistake if admitted by the arbitrators."\*

Lastly, the award may be set aside from the bad conduct of the parties themselves, fraudulent concealment on the part of witnesses, &c. But even when the testimony of witnesses is impugned, the courts will not lend an over-ready ear to such complaint, because they consider that cross-examination and other means of investigating and ascertaining the truth might have been resorted to.

I must add that since the first edition of this volume, several cases concerning arbitration have been decided. With but a single exception, they appear all to look one way, viz., a desire to countenance and uphold the proceedings of the arbitrator's inexpensive tribunal. Thus, in *Hodgkinson v. Fernie*,† the Court expressed itself disinclined to interfere with an award, stating that the arbitrator was "sole

\* Russell, p. 658.

† Common Pleas, Nov., 1857.

and final judge of law and fact." In *Anning v. Hartley*,\* mentioned previously, the Court supported an award in spite of some irregularities in signing and taking evidence, but involving no misconduct of arbitrators, to whom it was sent back to be rectified. *Hogg v. Burgess*,† carries out the principle of non-interference, although the reference is a compulsory one under the Common Law Procedure Act of 1854. And in *Fryer v. Shaw*,‡ the Court would not disturb the award, although it had been made *ex parte*, one party to the reference having gone away prematurely, under the impression that there would be a notice of another meeting.

The cause adverse to an arbitrator's award was that of *Roberts v. Eberhardt*,§ where it was set aside by the Court on account of informality as to costs, and the arbitrator having taken costs out of monies he held as receiver.

\* Exchequer, Jan., 1858.

‡ Exchequer, May, 1851.

† Exchequer, May, 1858.

§ Common Pleas, Nov., 1857.

## APPENDICES.

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### APPENDIX No. 1.

#### WARRANTY OF "FREE FROM PARTICULAR AVERAGE" ON BULK CARGOES. SEPARATE PACKAGES.

JANSON (Plaintiff in error) v. RALLI (Defendant in error).

*Exchequer Chamber, 9th May, 1856.*

THIS was a case stated, without pleadings, by consent and order, &c. The case stated that the action was brought to recover a total loss on, &c., on two policies of insurance at and from Calcutta to London in respect of bags of linseed. One of the policies was effected on the 6th October, 1851, at and from Calcutta to London, &c., upon any kind of goods and merchandises, and also upon the body, tackle, &c., beginning the adventure upon the said goods and merchandises from the loading, &c. "N.B. Corn, fish, salt, fruit, flour, and seed are warranted free from Average, unless general, or the ship be stranded," &c. The second policy was effected on the 21st October, and was in similar terms. The defendant subscribed each of these policies, &c. On the 18th October, 1851, 2,225*l.* had been declared on the first policy in respect of goods to which the present question has no reference. This left 775*l.* still to be declared, &c. On the 18th November, 1851, the following declaration of interest was indorsed on the first policy: "Per Waban (R. M.) c, 2,668 bags Linseed, 1,600*l.*" The following declaration was indorsed on the second policy:—"Nov. 18, 1851.—Per Waban, Linseed, 1,600*l.* See marks on previous policy," &c. The linseed insured and stated in these declarations was packed in 2,688 bags, which were shipped at Calcutta for London. The plaintiffs were interested in the linseed. The ship Waban sailed from Calcutta, with the 2,688 bags of linseed on board, on, &c. The linseed was packed in separate bags, each being of the same size and containing the same quantity. In the course of the voyage the ship met with a hurricane, &c. A part of the cargo was thrown overboard to lighten the ship, and amongst other goods so thrown over were 505 bags of the linseed insured. The ship ultimately arrived at the Cape of



Good Hope in a very damaged state, and a large part of the cargo was there discharged. Of the 2,688 bags so shipped, 1,023 bags were in such a state from sea-damage that a large portion of the said linseed was thrown into the sea as totally rotten and worthless, and the rest was sold, and only realised a few shillings, and if sent on in the vessel, would have lost the character of linseed before arrival in England. The remaining 1,160 bags were brought sound to England, and delivered to the plaintiffs. No notice of abandonment was given to the defendant. The ship was not stranded. The plaintiffs claim a total loss upon each of the 1,023 bags. If the Court should be of opinion that the plaintiffs are entitled to a total loss, the amount payable by the defendant will be 8*l.* 12*s.* 11*d.* on the first policy, and 26*l.* 1*s.* upon the second policy, and judgment is to be signed accordingly for the plaintiffs. If the Court should be of opinion that the plaintiffs are not entitled to recover such total loss, judgment of non pros. is to be entered for the defendant. Afterwards, &c. Judgment for the plaintiffs. Suggestion of error, and joinder. Plaintiffs' points—The plaintiffs will contend that they are entitled to recover as for an absolute total loss of the 1,023 bags of linseed. Defendants' points—That any injury, &c., short of actual or constructive total loss, is commonly recoverable, if at all, as a partial loss on Particular Average; that as a large portion of the cargo in this case was saved, there was no total loss; and as particular average is by the terms, &c., excepted, there was no partial loss; that the insurance being on goods generally, the declaration that the interest was on seed packed in bags did not create a separate insurance on each bag; that *Davy v. Milford* (15 East, 559) had no application, &c. The case was argued in Michaelmas Term (November 15, 1855), before Jervis, C. J., Pollock, C. B., Parke, Alderson, Platt, and Martin, BB., and Crowder and Willes, JJ.

JERVIS, C. J., now delivered the judgment of the Court.—This action was upon two policies of insurance upon goods in respect of a total loss of 1,023 bags of linseed, part of a larger quantity shipped on board the *Waban* for a voyage from Calcutta to London. The first policy was effected on the 6th October, 1851, for 3,000*l.*, upon goods insured by order of the plaintiffs, from Calcutta to London, by ship or ships. It contained the usual memorandum, by which, *inter alia*, seed was "warranted free from Average, unless general, or the ship be stranded." The second policy was to the like effect for 6,000*l.*, to follow the insurance for 3,000*l.*

The linseed of which that in question formed part consisted of 2,688 bags, shipped on board the *Waban* for the voyage insured. It was declared and indorsed upon the first policy as follows, viz.:—

"Per *Waban*,

(R. M.) c, 2,688 bags linseed, 1,600*l.* ;"

and upon the second policy as follows, viz.:—

"Per *Waban*, linseed, 1,600*l.*"

The vessel upon her voyage met with a hurricane, in the course of which 505 bags of the linseed, as to which no question arises, were thrown into the sea to lighten the vessel, and she was ultimately driven into the Cape of Good Hope, where 1,023 bags were found to be in such a state from sea-damage that a large portion of the linseed in them was thrown into the sea as rotten and worthless, and the rest was sold, and only realised a few shillings, and, if sent on in the vessel, would have lost the character of linseed before arrival in England. It is in respect of those 1,023 bags that the question arises, the remaining 1,160 having been brought sound to England, and delivered to the plaintiffs.

The plaintiffs below contend that they are entitled to recover in respect of this loss, notwithstanding the terms of the memorandum, on the ground that this was not in its nature an Average, but a total, loss. It was not denied, that if the linseed had been shipped in bulk, and an equal or even greater portion of it had been lost in a similar way, the warranty would have exempted the underwriters from liability. This is now too clear to admit of any serious doubt; but it was said, that the fact that the cargo was shipped in bags made a difference, and that by reason of the shipment having been in that form, the warranty must be held to apply, not to the whole cargo, as in the case of a shipment in bulk, but to each bag, as being a distinct object, capable of separate insurance and valuation; and that, as 1,023 entire bags had been lost, there was a total loss of each of those portions of the cargo, and the warranty against Particular Average consequently inapplicable. If this proposition be sustainable, that the warranty is upon each bag, and not upon the cargo, consisting of all the bags, either upon the natural construction of the memorandum, or in any sense in which it has been construed by former decisions binding upon us, the plaintiffs are entitled to recover.

As to its natural construction, there is no difficulty. The memorandum was introduced for the protection of the underwriters against partial losses of the subject-matter insured. It is framed in general terms, and must, therefore, according to the well-known rule of construction (Bac. Max. 10), be applied to the whole of each subject-matter falling within its terms, except such construction be limited or controlled by reference to other parts of the policy. Thus, in the particular case of seed, the warranty applies, in terms, to all seed loaded on board the vessel, without restriction to seed loaded in bulk or in any particular manner, unless it appear by the terms of the policy—as, for instance, by separate valuation—that it was intended to distinguish one portion of the seed from another, and to make a separate insurance upon each portion, as well as a joint one upon all. There is, for this purpose, no difference, in point of reason, between the total loss, by the same perils, of part of a cargo loaded in bulk, and part of the same cargo loaded in bags, each being equally a total loss of a part, but equally a par-

tial loss of the whole. The fact of the cargo being in bags only renders it more practicable to value and insure each bagful separately ; but in the absence of a separate valuation, or other similar expression, to indicate an intention to insure each package severally, as well as the whole jointly, it does not of itself show that the policy, which is in terms upon the whole, was intended to apply severally to each particular bag, any more than it would apply to each separate particle of a cargo loaded in bulk. If the case were free of authority, therefore, we should have felt no difficulty in holding that the memorandum applies to the whole of each species of which the cargo consists, whether in bulk or in packages, unless the packages be separately valued, or otherwise separately insured, which in the present case they are not.

The plaintiffs below, however, insist that it has been established by authority, and is settled law in this country, that if a cargo of perishable goods, warranted free of Particular Average, be made up of several packages, each capable of a distinct valuation, and any one package of these be entirely lost, there is a total loss of such package, for which the underwriters are liable, notwithstanding the warranty, and though all the rest of the cargo arrive in safety.

We proceed to consider the authorities which are said to establish this proposition.

In *Lewis v. Rucker* (2 Burr. 1167) the sugar was warranted free from Average under five per cent. It was shipped in hogsheads, and valued at 30*l* per hogshead the clayed sugars, and 20*l* per hogshead the Muscovado sugars, and it was damaged to the extent of more than five per cent. The passage in the judgment of the Court relied upon by the plaintiffs related only to the question, whether, upon a total loss of ten hogsheads separately valued, the value in the policy was to be taken as the amount to be paid, or whether regard was to be had to the price for which the rest of the cargo might be sold. From the very nature of the case, therefore, Lord Mansfield could not have intended to express an opinion that the loss of ten hogsheads only, not separately valued, and without anything in the policy to indicate that they were meant to be separately insured, would fall upon the underwriters. The case of *Lewis v. Rucker* turned entirely upon the principle by which the amount payable by the underwriters was to be ascertained, and the case has no bearing upon the present question.

The case of *Davy v. Milford* (15 East. 559), which was principally relied upon by the plaintiffs below, has been much misunderstood. It was an insurance, at and from London to Exeter, "upon flax," warranted free of Particular Average. The flax was packed in twenty-four separate mats, weighing in all between five and six tons. The vessel was wrecked off Rye, about half a mile from the shore. Part of the flax floated on shore in a loose state, out of its packages, and was mixed with a little sand, and injured ; and the other part of it was afterwards gotten out of the

bottom of the sunken vessel at different times, and was brought on shore. The whole quantity saved was about a ton, making more than one-sixth of the whole. No entire package came on shore. What did come on shore was loose and wet, and, as flax was a perishable commodity, it was necessary to sell it, and it was accordingly sold on the spot, and realised net 2*l.* 15*s.* per cent. upon the sum at which the whole was valued. No notice of abandonment was given. It does not appear from the report that any one of the mats of flax was entirely lost. Under these circumstances the plaintiffs sought to recover as for a total loss of all, whilst the defendant insisted upon there having been no notice of abandonment, and also upon the warranty against Particular Average. The point actually decided in *Davy v. Milford* is expressed with tolerable correctness in the marginal note, as follows—that “upon a policy of insurance on flax, valued at so much, and warranted free of Particular Average, if the vessel be wrecked, and the insured do not abandon, but labour to save the cargo, and in fact save a part, though much damaged, they are entitled to recover as for a total loss of that part which was in fact totally lost, but not for the rest which was saved to them in specie, but deteriorated.” That this note correctly expresses the opinion of the Court, and that their decision in no respect turned upon the fact of the flax having been shipped in separate mats, distinctly appears from the language of the judgment (15 East, 566), viz. “No case has been cited to show that where the least particle of the thing insured subsists in specie, though the greater part is actually destroyed, the insured shall be precluded from recovering the value of that which was in fact totally lost.” And again—“The plaintiffs are entitled to recovery as for a total loss the value of that part which was in fact totally lost, and they are not entitled to recover for that part which was not totally lost, but still continued to subsist in specie, though deteriorated in value.” This judgment was, in truth, a mere application of what Lord Ellenborough had stated to be his opinion in the course of the argument (15 East, 563), viz. “that the policy was to be construed *divise*—that is, that as to the part which was not saved from the wreck, there was a total loss; and as to that which was saved, but damaged, it was a partial loss.” Far from holding that the fact of the flax being packed in separate mats was important, the Court decided that in respect of *all* the flax that was lost the plaintiffs were entitled to recover, without expressing any regard to whether that which was saved formed part of the same package or packages with all or a portion of that which was lost. This latter question would obviously have been material if the insurance, though in terms general, “upon flax,” had been treated by the Court as in effect several upon each separate mat; because some of that which was lost must have formed a portion of the same mats with portions of the one ton which was saved; and if the insurance had been upon each separate mat, then, inasmuch as portions of some, if not all, of the mats were saved, the plaintiffs

could not have been held entitled to recover in respect of *all* the flax that was lost. The Court, therefore, in construing the policy "divisè," did so not as to each separate package, but as to each portion of the cargo considered as one entire bulk of flax ; and their decision was intended to be, and was, that the warranty, "free of Particular Average," did not extend to the case of total loss of a part of the subject-matter insured, which had sunk to the bottom of the sea, and thereby ceased to exist—a proposition which, as applicable to the case of a shipment in bulk, is admitted not to be maintainable, and is in direct variance with the later decisions, to be presently mentioned, and with which we agree.

In *Hedburg v. Pearson* (7 Taunt. 154 ; S. C., 2 Marsh. 432) the insurance was on "hogsheads of sugar," warranted free of Particular Average, and all but a small portion of the sugar in each of the hogsheads was washed out and entirely lost, the part saved amounting to only three per cent. upon the whole cargo ; and the Court held that the loss was within the warranty, and the insured were not entitled to recover. The Court are reported (7 Taunt. 155) to have said, "that in *Davy v. Milford* there was a clear line to be taken, for *some of the bundles of flax never came on shore*. With respect to this supposed distinction between the two cases, it is not founded upon any fact stated in the report of *Davy v. Milford*. It does not appear that the flax which came on shore belonged to any particular bundle or bundles, and from its quantity it must have consisted of parts of several if not all the mats. Further : the plaintiffs in that case, as already observed, recovered, not in respect of one or more mats no part of which came ashore, but for all the flax that did not come ashore, without regard to whether it formed a portion of the same mat or mats with that which was saved. According to the report of *Hedburg v. Pearson* (2 Marsh. 432), Gibbs, C. J., said—"The case of *Davy v. Milford* differs from the present, because here each hogshead had some sugar saved in it, though but little. If any of the hogsheads had been entirely lost, it would have been a total loss as to them ; but as it is, I do not see where we could stop, or how to draw the line." This dictum of the Lord Chief Justice is the only distinct trace we find in the reports of any distinction supposed between the effect of the warranty against Particular Average as to a cargo in bulk and as to a cargo of the same commodity in separate packages not separately valued. It was only a statement of what Gibbs, C. J., supposed to have been decided by the Court of Queen's Bench in the case of *Davy v. Milford* ; and as it was founded upon a misapprehension of that case, it is not entitled to the respect which an independent opinion, though extra-judicial, might have commanded.

In *Cologan v. The London Insurance Corporation* (5 Mau. & S. 447), 585 bushels, being part of a cargo of wheat insured under the description of "8,224 bushels of wheat," with a warranty against Average unless general, were so damaged by sea-water that

they were, by order of magistrates, for the sake of the public health, thrown overboard and lost. It was argued on behalf of the plaintiff, that here, at all events, was a total loss of part, for which he was entitled to recover; to which it was answered for the underwriters, "Is not this rather a partial loss of the whole than a total loss of a part?" (which might have been better put thus—"Is not a total loss of part *ex vi terminorum* a partial loss of the whole?") It became unnecessary to decide the question, the plaintiff having been held entitled to recover upon other grounds as for a total loss of the whole cargo; and no opinion was expressed upon it by Lord Ellenborough or Bayley, J.; but Abbot, J., said that he strongly inclined to the conclusion that this was "a total loss of part;" and Holroyd, J., stated the inclination of his opinion to be, that "after part of the whole cargo was thrown overboard, there was a total loss by perils of the sea of that part." Assuming that those learned judges meant to say, not only that there was a total loss by perils of the seas within the meaning of the policy, notwithstanding the actual existence of the corn, though in the form of a nuisance, at the time it was thrown overboard (as to the correctness of which no doubt can now be entertained), but also that the value of such part might be recovered notwithstanding the warranty against Particular Average, their opinion was to the same effect as *Davy v. Milford*, namely, that the warranty does not include the case of a total loss of part, involving the total destruction of that part by its sinking to the bottom of the sea. The case itself was one of shipment in bulk; and though the corn was described as "3,224 bushels of wheat," that was a mere description of the quantity, and had not the effect of making the insurance distributive as to each bushel. The opinions of the two learned Judges in that case do not point to the existence of any distinction between shipment in bulk and in packages; they stand upon the same ground as *Davy v. Milford*.

In *Hills v. The London Insurance Corporation* (5 M. & W. 569) the insurance was upon wheat valued at 1,600*l.*, and warranted free from Average, except general, or the ship should be stranded. The wheat was shipped in bulk; and during bad weather, which caused the vessel to make water, and rendered the use of the pumps necessary, 75*l.* worth of the wheat was pumped out with the water, and wholly lost. The Court of Exchequer held that the underwriters were protected from liability by the warranty. In the report of this case in 5 M. & W. 567, Lord Abinger is made to give an account of *Davy v. Milford*, wholly at variance with the facts of that case, but which answers to *Lewis v. Rucker* (2 Burr. 1,167)—not as suggested by Mr. Phillips in his very able work (2 Ph. Ins. 459), to *Hedburg v. Pearson*. The case referred to by Lord Abinger was one in which "each hogshead was separately valued and insured, and therefore a loss of one was properly held to be a total loss of that hogshead." This identifies the case of which Lord Abinger was speaking as *Lewis v. Rucker*, in which there was a separate

valuation of each hogshead, whilst in *Hedburg v. Pearson* the insurance was upon "hogsheads of sugar" generally, without any separate valuation of each hogshead. That *Lewis v. Rucker* was the case referred to by Lord Abinger appears still more clearly upon reference to the contemporaneous report of *Hills v. The London Insurance Corporation* (9 L. J., Ex., 27), where Lord Abinger is reported as having referred to the case in 2 Burr. 1,167, and not to that of *Davy v. Milford*. This correction makes the judgment consistent, so far as it touches the question whether shipment in packages makes any difference in the liability of the underwriter. The following passage in the judgment, as reported in 5 M. & W. 576, is material, viz. "Where the insurance is upon each package separately"—not merely where the cargo is shipped in packages, but "*where the insurance*" (as in *Lewis v. Rucker*) "*is upon each package separately*"—"it is to be treated as a total loss upon each package lost; but when it is an insurance upon the bulk, unless the loss exceed a certain value upon the particular article, there is no Average loss, and there cannot in such a case be any total loss of a portion only of the cargo." This judgment of the Court of Exchequer lends no countenance to the doctrine asserted by the plaintiffs, that the entire loss of a part of a cargo of the same description of goods may be partial or total, according to whether the cargo was shipped in bulk or in separate packages; and if the latter, whether the amount lost consisted of part only of each and every, some or one, or of the whole of one or more of such packages.

In *Navone v. Haddon* (9 C. B. 30) the insurance was upon eighty-one bales of waste silk, valued at 2,245*l.*, and warranted free of Particular Average, unless the ship should be stranded, upon a voyage from Genoa to Leghorn, and thence to Liverpool. The vessel was forced by stress of weather to put into Gibraltar to repair, and some of the bales of silk were found to be so damaged by the sea-water that the master, in the exercise of a reasonable discretion, such as a prudent owner uninsured would have exercised, sold them on the spot. They might, however, at a reasonable expense, have been put in a condition to be brought to Liverpool in another vessel. The Lord Chief Justice (Lord Truro) in giving judgment said (9 C. B. 42), that "no one of the bales was so damaged as to make the whole contents useless for any mercantile purpose; there was, therefore, no entire loss of any one bale." And again (*Id.* 43)—"The facts found are, that the silk in question was only partially damaged; that no one package was so injured as in the result to lead to its entire destruction; but that the whole might have been sent forward as silk in a reasonable time, and at a reasonable expense." These expressions are relied upon to show that in Lord Truro's opinion, if any one bale had been wholly destroyed, the insured might have recovered. We do not, however, understand them in that sense. The Lord Chief Justice was speaking with reference to the facts before him, and used the fact, that no one

package was entirely destroyed, to show that not only was the plaintiff not entitled to recover, but that there was nothing to raise any serious question of liability, such as the present discussion shows might have arisen if any one of the bales of silk had been wholly destroyed. It has also been said, that in the course of the argument in *Navone v. Haddon*, Cresswell, J. (9 C. B. 88), recognised *Davy v. Milford* as good law. This, however, was erroneous, because the learned Judge cited *Davy v. Milford* as an authority only to show that the plaintiff in *Navone v. Haddon* could not recover in respect of what was saved in specie, though deteriorated, as to which point the decision in *Davy v. Milford* has not been questioned. The same remark applies to the citation of *Davy v. Milford*, by Dampier, J., in *Glennie v. The London Insurance Corporation* (2 Mau. & S. 377), for the purpose of showing that the warranty against Particular Average exempted the underwriters from liability in respect of a cargo of rice so damaged that it did not produce sufficient to pay the freight.

Mr. Stevens's work on Average was also referred to by the plaintiffs below; but so far as it can be considered an authority, it is against the existence of any distinction for this purpose between a shipment in bulk and a shipment in separate packages. At pp. 224 and 225 (p. 399, ed. 1833), the author states it to have been the practice to insert in the policy an express clause "to pay Average on each package, as if separate interests, separately insured," or, "to pay Average on each ten, fifteen, twenty hogsheads," (as the agreement may be), "succeeding numbers, as if," &c.; and he proceeds to say, "It is now indeed considered so much agreeable to usage, where goods are insured direct from the place of growth or manufacture, that if the clauses 'to pay Average on each species' of produce, or 'on each package' of manufactured goods, are not inserted, yet a liberal construction is put on the omission, and the policy is acted on as if they were. The reason is this, that no objection would have been made to it when the insurance was effected, and in consequence it is considered in practice as a mere verbal omission of the broker, and treated as such, agreeably to the opinion of Magens, 74, who says, 'In an insurance made generally on goods, each different parcel or kind of goods ought to be considered by itself.'" This statement of the author shows that it was the practice in certain cases only to insert express words, to bind the underwriter to pay in respect of each package, and that their omission was in such cases only, not universally, treated as a mistake, and the policy acted upon as if it had contained them. So far, indeed, is the author from suggesting that the policy, without such words, would in point of law bind the underwriter as to each package, that in the note to p. 224 (p. 399, ed. 1833) he states a doubt of Magens, "if 101 chests of goods be insured, and three chests be totally damaged so as to be worth nothing, whether the loss can be claimed of the underwriters;" and goes on to say,



"Strictly speaking, it cannot, and it is to obviate this difficulty that the above clauses are, by his recommendation, introduced into the policy." So that the opinion of the author is against the claim of the plaintiffs below, founded upon the shipment having been in bags, in the absence of an express separate insurance of each bag. At p. 233 (p. 405, ed. 1833), however, he states two points to be settled, viz., "That when goods are warranted free from Average the underwriters are liable to pay a total loss of a part, or a partial loss of the whole, if part of the thing insured go in bulk to the bottom of the sea, [or if it be rendered totally worthless, though it subsist in specie]\*; and that (with the same warranty) they are not liable to pay a partial loss, though it be in fact a total loss of a part, if that loss be the consequence of sea-damage." For the first of these points he refers only to the case of *Davy v. Milford*, and it is remarkable that in this part of the work he is speaking without reference to any distinction between a shipment in bulk and in packages. At p. 235 the same author says, that "where there is a total loss of a part in bulk, whether it goes to the bottom of the sea by accident, or whether, by being rendered worthless, it is thrown into the sea, or remain on land, the underwriters are liable, though the article be insured 'free of Particular Average†.'" The authorities referred to for this position are, the judgments of Lord Alvanley in *Dyson v. Rowcroft* (3 B. & P. 474), and of Lord Ellenborough and Abbott, J., in *Cologan v. The London Insurance Corporation* (5 Mau. & S. 447). In both those cases, however, the goods were, for aught that appears, shipped in *bulk*; and the loss was held to be total of the entire cargo; and both Lord Alvanley and Lord Ellenborough confined their judgments to that view of the case; whilst the extra-judicial dictum of Abbott, J., as already observed, was to the same effect as *Davy v. Milford*.

The statement of Mr. Stevens upon this point, therefore, must stand or fall with that case.

There remains to be noticed the learned work of Mr. Arnould, in which (2 Arn. Ins. 1038) the law is laid down as contended for by the plaintiffs below; but whilst we fully recognise the merit of that work as a compilation, we cannot treat it as establishing a proposition not borne out by the authorities referred to by the learned author, all of which we have examined for ourselves.

It appears, upon this review of the authorities, that the judgment in *Davy v. Milford* did not proceed upon the fact of the goods having been shipped in packages, and, indeed, that it could not be sustained upon that ground. It was not put upon the ground that the flax saved could not have been brought in the state of flax to its destination, because in that case the plaintiff ought to have recovered for a total loss, with benefit of salvage to the underwriters. It is at

\* The words between brackets are omitted in the later edition of 1833.

† This passage does not occur in the later edition of 1833. (See pp. 428-435.)

variance with the plain meaning of the memorandum, and with the numerous authorities from which attempts have been made to distinguish it ; amongst others, *Hills v. The London Insurance Corporation* : and so far as the judgment was against the underwriters, it must now be considered as overruled. The same of the dicta of Abbott and Holroyd, J.J., in *Cologan v. The London Insurance Corporation*. The same of the dictum of Gibbs, C. J., in *Hedburg v. Pearson*, which arose from a misapprehension of *Davy v. Milford*. The citations of *Davy v. Milford* by Dambier, J., in *Glennie v. The London Insurance Corporation*, and by Cresswell, J., in *Navone v. Haddon*, were for the purpose of showing that the plaintiffs in those cases could not recover in respect of what remained in specie, and they add nothing to its supposed authority as to the right to recover for the part that was lost. The supposed reference to *Davy v. Milford* by Lord Abinger in *Hills v. The London Insurance Corporation* appears to have been a mistake of the reporter.

These remarks upon the cases cited dispose also of the statements in the text-books founded upon them ; and it appears in the result that there is no authority binding us to construe the memorandum in any sense different from the ordinary meaning of the words.

We have looked into the works of foreign writers to ascertain whether there was anything in the general maritime law to guide us in our judgment.

In Valin's Commentary on the ordonnance de la Marine of 1681, liv. 8, tit. 6, "*Des Assurances*," sect. 47, and Emérigon's *Traité des Assurances*, c. 12, ss. 45, 46 (second volume of the edition by Boulay Patey, pp. 8 to 20), the history and effect of the warranty "free of Particular Average" are stated and discussed. It appears that a similar clause was in use in Italy as early as the sixteenth century, and that it was confined in construction by the Italian lawyers to cases of trifling and inconsiderable jettison or damage in usual and ordinary events. Valin, in his Commentary, objects to the general introduction of such a clause, on the ground of its tendency to abuse, because of giving the captain an interest in the destruction of the vessel by stranding ; and that notion at one time prevailed to such an extent that the Court of Admiralty at Marseilles, in 1718, exceeded its jurisdiction so far as to make an ordonnance (shortly afterwards annulled by the parliament of Aix) prohibiting the introduction of the clause into policies under a heavy penalty. The opposite view, however, ultimately prevailed. Pothier (*Des Assurances*, 166), Emérigon (*ubi sup.*), and Boulay Patey, in his Commentary on Emérigon (2 Emérigon, 14), shows it to have been settled in France long before the Code de Commerce (see sect. 409) that the clause "free from Average" was valid, and exempted the underwriters from all average loss, whether general or particular, except in cases of total loss of the whole, either actual or constructive. We find no trace throughout the discussions of the subject by those great lawyers of a distinction as to the mode in which the

cargo is packed. The diversities of opinion expressed by them relate to the validity of the clause, and the extent and character of the loss which should be considered as falling within its terms, and not in any respect to the circumstance of shipment in bulk or in packages. Indeed, in one of the cases reported by Emérigon, sect. 46 (2 Emérigon, by Boulay Patey, 18), the cargo consisted of soap in boxes, and the insured were held not to be entitled to recover in respect of a jettison (in the nature of General Average) of 200 boxes. Under the circumstances of that case, the insured in an English policy, with the ordinary memorandum, would have been entitled to recover, either on the ground that it was a General Average loss, or that the ship was stranded. That, however, would only be in consequence of the express exceptions of General Average and stranding in the English form, and the case is in point to show that the clause "free of Average" was considered by Emérigon to apply to the whole cargo, though shipped in separate packages.

In America the point has been much considered; and it appears, from the authorities cited in argument, to be there held that the form of shipment, whether in bulk or in separate packages, makes no difference in the liability of the underwriters; and that the insured has no claim on account either of a partial destruction of the value of the article, or the destruction of a part of the article, whether it be shipped in bulk or in separate packages, unless the policy indicate that a loss is to be adjusted on each package; in other words, unless each package is separately valued and insured.

It was said by the learned counsel for the plaintiffs below, that the authority of the foreign decisions on this subject was weakened by the fact, that in other countries abandonment is permitted to the insured in cases where the average bears a large proportion (now in France 75 per cent.—Code de Commerce, 369; Dictionnaire du Contentieux, Commercial Délaissement, note 45; in America 50 per cent.—Philips, 1536) to the entire value of the subject insured. These provisions no doubt give a wider application to the doctrine of constructive total loss and abandonment, and increase the liability of underwriters by enlarging the number of cases in which the loss is considered total; but with respect to those cases in which the loss is partial, the construction to be put upon the language of the memorandum ought to be everywhere one and the same. All considerations of hardship are excluded by the nature of the question, what is the true construction of the contract which the parties have entered into? Is this a case in which the underwriters have contracted to be liable, or have stipulated to be exempt? Moreover, we refer to the foreign authorities only to show that there is nothing in the general law merchant to sanction the proposition contended for by the plaintiffs below, or in any way inconsistent with the result at which we have arrived.

It was suggested in the course of the argument, that there was

some usage of trade affecting the question ; but no such usage is stated in the case to exist in point of fact ; and we need not consider how far such a usage, if it existed in fact, could control the terms of the policy.

We have not lost sight of the argument of the defendant below, that although the policy is upon a voyage "in ship or ships," it expresses within its four corners the entire contract between the parties ; that the subsequent declaration of interest was merely the act of the insured, in the exercise of a power conferred upon them ; and that they could not thereby alter the effect of the policy. We need not, however, further notice this argument, because assuming, in favour of the insure, that each of the policies had contained the words in which the interest was declared upon the first, viz., "Per Waban (R.M.) c, 2,688 bags linseed, 1,600*l*," in our judgment the result ought to be the same.

We are of opinion, that where memorandum goods of the same species are shipped, whether in bulk or in packages, not expressed by distinct valuation or otherwise in the policy to be separately insured, and there is no General Average, and no stranding, the ordinary memorandum exempts the underwriters from liability for a total loss, or destruction of part only, though consisting of one or more entire packages, and though such package or packages be entirely destroyed, or otherwise lost by the specified perils. As to their liability in respect of different species, we need not express any opinion.

For these reasons we reverse the judgment of the Court of Queen's Bench, and give judgment for the defendant below.

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## APPENDIX, No. 2.

### UNSEAWORTHINESS.

THOMPSON v HOPPER.

*Queen's Bench, February, 1856.*

THE Judges were not agreed, and they delivered their judgment as follows :—

ERLE, J.—By the demurrers to the three pleas in this case, three questions, arising upon the meaning of the judgment in *Gibson v. Small* (4 H. L. C. 358), must be decided. On the first plea the question is, whether, upon a time policy on an outward-bound ship lying in the port of the owner's residence, the shipowner can recover for a loss if he sends her to sea in an unseaworthy state. On the second plea the question is, whether he can recover if he does so knowingly ; and on the third plea the question is, whether he can

recover if he does so knowingly, and the ship is lost by reason of that unseaworthiness.

As none of these questions are decided by *Gibson v. Small*, the authority of the supreme Court does not preclude a free consideration of them. That Court decided that the plea there was bad, seemingly on the ground that if a ship insured by a time policy is at the commencement of the risk in an unknown sea, and in an unknown state, the owner does not warrant that it is in the state requisite for setting out on a voyage. To this extent all the Courts are bound. But when it is proposed to adopt the opinions of Parke, B., and Lord Campbell, there expressed (4 H. L. C., 406, 423)—viz., that there is no warranty of seaworthiness in any time policy—and therefore to hold the first plea in this case bad, whatever deference I may feel for those opinions, still I must pray leave to state my dissent as well from the opinion as from the reasoning from which it was deduced. The reasoning was, that a time policy is to be construed as an ordinary contract in writing by the terms thereof, and not as a contract for marine insurance, subjected to the rules of law relating thereto, it being assumed that those rules were laid down for voyage policies, and were not adapted to time policies—at least, as far as relates to the warranty of seaworthiness at the commencement of the risk. This warranty in voyage policies being supposed to be implied by law, by reason of the owner being supposed to know and to have power over the state of the ship, while the owner in the case of a time policy may sometimes not have such knowledge and power to the same extent; it being also assumed that a time policy, silent alike as to warranty and disclosure, and exempt by reason of that silence from warranty, would not be exempt by the same reason from the rule requiring a disclosure of all material facts; and it being also assumed that the abolition of any security for the state of the ship to the insurer would tend to give simplicity and certainty to this branch of the law; I think this opinion and this reasoning contrary alike to the authority and to principle. As to authority, it does not appear that any person ever expressed the opinion that there was no warranty in any time policy until Parke, B., spoke in the House of Lords. In all the authorities there cited—see *Hollingworth v. Broderick* (7 Ad. & El. 40); *Dixon v. Sadler* (5 M. & W. 405; S. C. in error, 8 M. & W. 895); *Hucks v. Thornton* (Holt, 80); 1 Arn. Ins., c. 14, s. 154, p. 411; 1 Ph. Ins. 328; and 3 Kent's Com. 288, 289, 4th ed.—the opinions are in favour of a warranty in time policies analogous to that in voyage policies; and though there was no adjudication upon the point, yet that was accounted for, because no shipowner before the plaintiff *Small* was shown to have disputed it. Again: throughout the stages of *Small v. Gibson* the opinions of all Courts and Judges were in favour of some warranty till Parke, B., spoke. The Queen's Bench adjudged for it absolutely (16 Q. B. 129); the Exchequer Chamber intimated an opinion for it under such circum-

stances as are here pleaded (16 Q. B. 141). In the House of Lords, every Judge except Parke, B., either affirms that there is, or inclines to think that there may be, a warranty of seaworthiness in some time policies; and Lord St. Leonards, who was one of the two peers deciding the case, gives an opinion that there is such a warranty under the circumstances here pleaded (14 H. L. C. 415). To these authorities ought to be added the general expression of the rule as applicable to marine insurance, without an exception of time policies, in the judgments and treatises where it is laid down, and the absence of any marine code of any nation excepting time policies out of the general rules governing marine insurance. Kent in his third Commentary (p. 807, 4th ed.) blends time policies with voyage, as if they were subject to the same incidents—"The insurer may take and modify what risks he pleases. The policy may be on a voyage *out*, or on a voyage *in*, or on the whole complex voyage *out and in*; or it may be *for part* of the route, or for a limited *time*, or from *port to port*, in an intermediate stage of the voyage." So they are blended in the Code de Commerce, art. 335, without distinction—"L'assurance peut être faite pour l'aller et le retour, ou seulement pour l'un des deux, pour le voyage entier ou pour un temps limité." In Arnould's Treatise, though voyage and time policies are treated of separately, yet he mentions (vol. 1, s. 155, p. 412) a third class, which indicates that the parties had no conception of an essential difference between time and voyage policies, viz., policies where time and voyage are mixed, as at and from London to Cadiz for six months, or from the 1st January, 1847, to the 1st June, 1847, at and from Bristol to Marseilles.

As on this review authority seems to weigh against the opinion contended for, so reasoning upon principle seems also unfavourable to it. It is said that the warranty of seaworthiness implied on a voyage policy cannot be applied by analogy to a time policy; that on a voyage policy the warranty means "fit to go to sea on the voyage," and that if it has been complied with, so that the policy has attached, it is at an end; and that a time policy on a ship being at sea would always be void if seaworthiness in the last-mentioned sense was warranted, and therefore no warranty at all is to be implied. The answer is, that seaworthiness is not used in this last-mentioned sense in respect of warranty. It is laid down in *Dixon v. Sadler* (1 M. & W. 405; S. C., in error, 8 M. & W. 895), and again in *Gibson v. Small* (4 H. L. C. 358), that the original meaning of the word has long been extended, and that it now means that the ship is fit for its duty in the ordinary degree. It is also clear that when once fulfilled, so that the policy has attached, it is not always at an end. The case of a policy on a ship at and from London on a whaling voyage to the north is almost too trite to be quoted. The warranty is for four gradations—fit for dock in London, fit for river to Gravesend, fit for sea to Shetland, then fit for whaling. The policy attaches if the ship is fit for dock, but the warranty is broken

if the other stages of fitness are not completed. (See 1 Arn. Ins. s. 249, p. 670.) If the word "seaworthy" has been extended to these four gradations, why may it not be extended by analogy to the middle or end of the voyage, and mean that the ship is then fit in the ordinary degree, that is, without extraordinary risk, to reach its port of destination? In *Paddock v. The Franklin Insurance Company* (11 Peck, 227), Shaw, C. J., says, that if the warranty of seaworthiness implied in voyage policies be implied also in those for time, the word must be construed with considerable latitude. This is true, and was done by Gibbs, C. J., in *Hucks v. Thornton* (Holt, 30), where a time policy was on a ship which had been in the South Seas for a year whaling and taking prizes, and the crew was so far reduced by death and desertion as to be inadequate to the whaling and guarding prisoners, but was adequate to sealing and getting home. The Chief Justice said (Holt, 34), "If the crew could perform some of the objects of the voyage with safety, and navigate the vessel home, she cannot be called unseaworthy." The latitude of construction which was adopted in this case for a time policy must also be adopted in respect of every voyage policy for the latter part of a voyage; and though it is difficult to define the line between seaworthiness and unseaworthiness generally, yet the facts of the majority of cases would probably be so far on one side of the line as to be clear of doubt. The facts in *Hucks v. Thornton* (Holt, 30) exemplify what would be seaworthiness according to the stage of the voyage; and the facts in *Gibson v. Small* may be referred to as showing what was clear unseaworthiness. In that case the risk began on the 25th September, and the ship had been so damaged by perils of the sea on her voyage before that day, that by reason thereof she was abandoned as a total loss after that day. The decision that the defendant in that case was liable decided that he must pay for damages which was not within his contract.

Furthermore, the nature of the contract of insurance shows that a warranty of the state of the ship is needed equally for policies of marine insurance, whether they are for the voyage, or for time, or mixed. There is authority for saying that the warranty of seaworthiness is the basis of the contract of the insurer. (See the authorities collected in Mr. Wilde's argument in *Gibson v. Small*, 4 H. L. C. 356; to which add 2 Duer's Law and Practice of Marine Insurance, 671, cited by Mr. Martin in *Small v. Gibson*, in the Exchequer Chamber, 16 Q. B. 141, 143.) This proposition cannot be carried into effect as a proposition of law unless the course of business in making marine insurance, and the effect of the decisions upon the well-known form adopted for policies, be assumed to be known in law. It is conceded to be contrary to law to take any single voyage policy out of the general class, and continue it as an insulated written contract. Equally contrary to law, as it seems to me, is it so to deal with a class of policies, such as all policies for time, or all policies on ships made of iron, or any other arbitrary

class. If the Court can notice the course of business as matter of law in making a voyage policy, so as to make the warranty the basis of the contract in that form, equally so must they notice it in applying the same proposition of law to policies for time, and the proposition so applied has the same effect upon both classes of policies, for the same reason. Thus on a proposal of a ship for insurance, a main question for the insurer must always be, whether the risk is ordinary or extraordinary; and that question can never be answered unless the state of the ship is given. If the ship is seaworthy in the sense of fit for its service in the ordinary degree, the risk would be so far ordinary, and the premium at the lowest sum which on an average would yield profit to the capital, care, and skill embarked. As the generality of ships would be fit for service in the ordinary degree, this would be the ordinary policy; and the contract would be made by underwriting, on a proposal containing the name of the ship, the amount to be covered, the duration of the risk, and the premium. In making this contract the insurer knows the early history of the ship from the register, and the last account from the disclosure of all material facts, and the present state from the warranty of seaworthiness; and as the duty to disclose and the warranty are universally wanted for policies at an ordinary risk, the law has given to the underwriters security that those duties shall be performed by the insured, for it makes them a condition of the underwriter's promise to indemnify. In this sense they are the basis of his contract. But if the ship is not fit for its service in the ordinary degree, a disclosure of the defect is essential to proportion the increase of premium to the risk from the defect. It may be a defect easily remedied—it may be a state bordering on destruction; so that in case of unseaworthy ships the insurance would be always in the nature of a special contract; and this is equally applicable to insurance for time or voyage. In the case of a ship with rotten timbers, the premium would be alike increased, whatever was the measure for the duration of the risk. If the warranty of the seaworthiness is in this sense the basis of the contract, it is a term introduced for the interest of the insurer, and is indispensable for him if he is to insure at an ordinary risk; it is called a warranty because it extends to latent as well as patent defects, and is not limited in the slightest degree by any reference to the knowledge or power of the insured; it is applicable alike to all ships whether at home or abroad, and to every insured whether foreigner or native, and to every policy whether for voyage or time. The law gives it as a security to the insurer, so that insurance may be a prudent mercantile investment; and not only for that reason, but also as it operates to prevent fraudulent insurance for the purpose of destruction, and the evils that follow in that train.

If this be the meaning of this warranty, being the basis of the contract, it is not legal reasoning to construe the contract of the insurer, as in *Small v. Gibson* seems to have been done, to be a



wager on the safety of an unknown ship, leaving it to chance whether at the commencement of the risk she was seaworthy, or a drifting hull without masts or anchors, as described by the Chief Baron there. Neither is it legal reasoning to exempt the shipowner from the warranty on account of a supposed want of knowledge in him. Still less is a Court justified in gratuitously assuming, as a fact known in law, that insurers for time have, as a class, less knowledge of the state of their ships than insurers for voyages.

With respect to the argument that the warranty of seaworthiness is not required to protect against fraud, because that is prevented by the duty of disclosure, I will only observe, that if time policies are to be construed by their written contents alone, there is no authority for importing the duty to disclose from the rules relating to marine insurance, more than the duty to warrant seaworthiness. And with respect to the argument for annulling the warranty in all time policies, I would observe that the importance of a rule depends on its accordance with the rights of the parties, and its analogy to the other parts of the same branches of law; and for the reason above assigned I submit that the proposed rule, though it might be of easy application for the moment, would really produce injustice and uncertainty.

Upon these grounds I am of opinion that there was a warranty of seaworthiness at the commencement of the risk on the time policy mentioned in the declaration, under the circumstances stated in the plea. It follows that the first plea is good, and it further follows, *à fortiori*, that the second and third are also good.

COLERIDGE, J., read the judgment of

LORD CAMPBELL, C. J., in which the rest of the Court concurred:—The question raised by the first plea in this case has never yet been decided, and we may say that the plea is sufficient, consistently with the judgment of the House of Lords in *Gibson v. Small* (4 H. L. C. 353). It was there held, according to the opinion of a large majority of the Judges who were consulted by their Lordships, that in a time policy upon a ship, framed in the usual terms, no special circumstances appearing respecting the situation or employment of the ship, there is not an implied condition that the ship shall be seaworthy on the day when the policy ought to attach. So far we are bound; but any opinions given upon the other questions submitted to the Judges must be considered extra-judicial, as they were not necessary to the decision of the case, and the House of Lords was not required to act upon them.

The first plea here does state special circumstances respecting the situation and employment of the ship, from which we are at liberty to say that in this insurance there is an implied warranty of seaworthiness. These circumstances are, that at the making of the policy the ship insured was an outward-bound ship, lying

in the port of Sunderland, where the plaintiffs resided; that she was there under a charter to carry a cargo from Sunderland to Constantinople; that the plaintiffs afterwards sent the ship, loaded with this cargo, out to sea in an unseaworthy state, and when she was not in a fit and proper condition safely to go to sea; and that the ship afterwards, while she was on the high seas in that state and condition, was wholly lost. If, under such circumstances, there was an implied condition that the ship should be seaworthy at the commencement of the voyage, this plea is a bar to the action. But I adhere to the opinion which I expressed in *Gibson v. Small* (4 H. L. C. 428), in conformity to that of a majority of the Judges, that although the time policy be effected upon an outward-bound ship, lying in a British port, where the insuring owner resides, a condition of seaworthiness is not to be implied. The Supreme Court of Appeal judicially determined, that with respect to an implied warranty of seaworthiness there is a difference between "voyage policies" and "time policies," there being with respect to the one class invariably an implied warranty of seaworthiness, and no such warranty with respect to the other class, at least unless peculiar circumstances are shown from which the warranty is to be implied. There being no usage for implying a warranty of seaworthiness as to time policies, and there being no decision in favour of such a warranty, and there being a solemn binding decision against such a warranty without special circumstances, I think that, according to principle and according to expediency, it ought not to be implied from the special circumstances alleged in this plea.

For the implied warranty of seaworthiness in voyage policies we have established mercantile usage, with a long series of decisions, and authorities from text-writers of the highest reputation. One reason given for the doctrine is, that in voyage policies the insured may generally be supposed to be aware of the condition of the ship when the voyage is to commence; but the rule is not confined to cases where the insured may be supposed to have this knowledge; for it applies to a voyage at and from a foreign port, the insured residing in England; and it applies to a voyage policy on goods, where the insured has no control over the outfit of the ship. I therefore think it would be illogical to infer that the condition of seaworthiness is to be implied wherever the insured has the opportunity of personally making himself acquainted with the state of the ship when the policy is intended to attach. We are now precluded from saying with respect to time policies (as we do say with respect to voyage policies), that by a general rule there is an implied warranty of seaworthiness; and much uncertainty and much litigation would arise from the doctrine that it may be implied from special circumstances. Not only would there be great difficulty in determining what special circumstances shall be sufficient for the purpose, but a long course of decisions would be necessary to ascertain the period at which, in time policies, the seaworthiness must exist. I

conceive that it would be much better to lay down the general rule, that in time policies there is no implied warranty of seaworthiness. At the bar it was said that this would be very hard upon underwriters. But they are protected wherever there is any fraudulent representation or concealment; they may make inquiries and introduce an express warranty, and they may always insist on a premium adequate to the risk which they run. Their interest is by no means neglected, when, in the absence of fraud, they are held liable if the ship exists as a ship when the policy attaches, although the ship be not then seaworthy; for they may judge, as well as the insured, what is likely to be the condition of the ship at the time when their liability begins. On the other hand, in many cases insurance could not answer its purpose of indemnification to the insured if the proposed condition were to be implied. After the point is conclusively settled that time policies do not in this respect come into the same category as voyage policies, I must respectfully doubt the power of courts of justice to add by implication a new condition to a written contract, occasionally, and according to circumstances, where they may think there is the same reason for introducing it as there is in a contract in which, according to usage and undoubted law, it is universally and invariably implied.

Some of the Judges, and Lord St. Leonards (4 H. L. C. 415), whose authority in every department of jurisprudence is entitled to the highest respect, did express an opinion, that in a time policy on an outward-bound ship, about to sail from a port where the owner effecting the policy resides, there is an implied warranty of seaworthiness; but there was a majority of opinions on the other side; and in *Jenkins v. Heycock* (8 Moo. P. C. 351), the Judicial Committee of the Privy Council, consisting of Jervis, C. J., Dr. Lushington, Patteson, J., Mr. Pemberton Leigh, and Sir E. Ryan, since *Gibson v. Small* was decided, and after deliberating upon that case in all its stages, intimated that they were strongly inclined to agree with Lord Campbell, and those who thought that in time policies there never is any implied warranty of seaworthiness, although, in the case before them, they were not called upon so to determine.

For these reasons it seems to me that on the first plea, which rests entirely on an implied warranty of seaworthiness, the plaintiffs are entitled to our judgment.

The second plea adds to the allegations in the first, that the plaintiffs "knowingly, wilfully, wrongfully, and improperly sent the ship, when loaded, out to sea in an unseaworthy state, and when she was not in a fit and proper condition safely to go to sea." But if I am right in what I have already contended for, there was no implied condition of seaworthiness, and the policy attached. If it did, is there enough alleged here to exempt the insurer from liability for loss? The exact nature of the unseaworthiness is not specified. Although the ship was not perfectly seaworthy, there may have been a great probability that she would reach her port of destination; and

there being no averment that the loss was occasioned by the unseaworthiness, it may have arisen from causes which were perfectly unconnected with the unseaworthiness, and which would have produced the same effect had she been perfectly seaworthy. The insured, therefore, are not shown to have produced the loss; and as it is stated in the declaration to have arisen from perils of the sea, I think that for anything disclosed by this plea the plaintiffs are entitled to recover.

But the third plea appears to me to be a bar to the action. Although I still deny any warranty of seaworthiness, I think that if this plea be true in point of fact, the loss must be considered as accruing from the wrongful act of the insured, which can give them no claim to indemnity. In addition to the statements in the former pleas, this plea avers that the plaintiffs sent the ship to sea "at a time when it was dangerous for the ship to go to sea in the state and condition in which she then was, and that they wrongfully and improperly caused and permitted the ship to be and remain on the high seas, near to the sea-shore, for a great length of time, in the state and condition aforesaid, and without a master, and without a proper crew to manage and navigate her on her said voyage, during which time the said ship, by reason of the premises, became and was wrecked and wholly lost." Here we have personal misconduct charged upon the plaintiffs, which misconduct produced the loss. By the English law of insurance, the insured are not obliged to keep the ship seaworthy throughout the voyage, or during the period of the risk, and if she is lost by supervening unseaworthiness arising from the negligence of the captain, the underwriters are liable as if the ship were burned from his negligence. But it is a maxim of our insurance law, and of the insurance law of all commercial nations, that the insured cannot seek indemnity for a loss produced by their own wrongful act. The plaintiffs' counsel said truly that the perils of the sea must still be considered the proximate cause of the loss; but so it would have been if the ship had been scuttled, or sunk by being wilfully run upon a rock. According to the statement in this plea, the plaintiffs efficiently caused the loss by their wrongful act; and if so, I think there was no necessity expressly to characterise that act as being either felonious or fraudulent. Upon the third plea, therefore, I think there ought to be judgment for the defendant.

The pleas to the second count being exactly the same as those to the first count, it follows that there ought to be judgment for the plaintiffs on the fourth and fifth pleas, and on the sixth for the defendant.—*Judgment for plaintiffs on the first and second pleas to the first count, and on the fourth and fifth pleas to the second count; for defendant on the third plea to the first count, and on the sixth plea to the second count.*

## APPENDIX, No. 3.

## UNSEAWORTHINESS.

THOMPSON v. HOPPER.

*Queen's Bench, 1856.*

LORD CAMPBELL now delivered the judgment of the Court in this case. The judgment was of an elaborate character, and occupied some time in the delivery. The action was on a time policy effected on the ship *Mary Graham*, alleged to have been lost by the perils of the sea. The defendant among other pleas pleaded that the plaintiff wilfully, wrongfully, and improperly sent the ship to sea in an unseaworthy state, and that by reason of the premises the ship was lost. The Court had held that certain of the pleas were bad, on the ground that in a time policy there was no implied warranty of seaworthiness, but the plea in question was held to be good. The action was tried at the last Durham Assizes, before Mr. Baron Bramwell, when the plaintiff obtained the verdict; but subsequently a rule was granted for a new trial, on the ground that the learned Judge had misdirected the jury. It was found by the jury that the plaintiff had sent the vessel from the port of Sunderland in an unseaworthy state, and that while lying in the roadstead, where it had been detained while it was being put in a seaworthy state, a storm came on after it had been put in a seaworthy state, and that the vessel was lost, not in consequence of its previous unseaworthiness, but in consequence of not being able to slip its anchor. The Court had come to the conclusion that the learned Baron had misdirected the jury in not asking them whether the wrongful act of the plaintiff in sending the vessel out of the harbour in an unseaworthy state, as set out in the third plea, had not caused the loss. The ship was sent out into an open roadstead, contrary to the custom of navigation, in a state in which it was unable to carry sail or to proceed on its voyage. An impending storm came on, in which the ship was wrecked, though if, when it left the harbour, it had been in a state fit to sail, it might have weathered the storm, and arrived in safety at its port of destination. The insurer was not liable when the loss was caused by the wrongful act of the assured. This was laid down in the case of *Bell v. Carstairs* (14 East.),—a case which his Lordship observed he was sorry to say had been decided nearly half a century ago. (This was in allusion to the fact that his Lordship was then at the bar, and was one of the counsel who argued the case for the defendant. It appears from the report that the judgment of the Court was given on the 2nd of July, 1811). The plaintiff could not recover from the underwriter the loss occasioned by himself. There was evidence for the jury that the wrongful act of the plaintiff

led to the loss, though it was not the proximate cause; and the rule for a new trial must be made absolute, in order that the question might be left to the jury. Although there was no difference of opinion in the Court, leave would be given to appeal, if the plaintiff wished to appeal, to a Court of Error.

Mr. Knowles said he was going to ask for that permission.

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## APPENDIX No. 4.

### UNSEAWORTHINESS.

FAWCUS v. SABSFIELD.

*Queen's Bench, in Banco, 28rd February, 1856.*

ERLE, J., read the judgment of Lord Campbell, C. J., in which Coleridge and Wightman, JJ., concurred.—The important question in this case is, whether, under the circumstances stated in the seventh plea, there was an implied warranty or condition that at the time when the ship sailed from Liverpool she should be seaworthy for the voyage on which she sailed. These circumstances are, that the policy was effected in Liverpool; that on the 15th April, 1854, when the risk was to commence, the ship was lying in the port of Liverpool; that she remained there till she sailed on the voyage on which she was lost; and that there were sufficient means while she lay in the port of Liverpool of repairing her, and rendering her seaworthy for the voyage. It is not alleged by the defendant that the plaintiff knew that the ship was unseaworthy, or even that he resided in Liverpool, or any part of the United Kingdom. For anything that appears, the plaintiff, when the policy was effected, may have been a merchant residing in Australia, and he may have sent the ship on a voyage from thence to England and back again, having insured her by a prior time policy till the 15th April, 1854. The arbitrator finds, as matter of fact, "that the insured did not know, either at the time of the making of the policy or at the time of the commencement of the risk, that the ship was unseaworthy; and further, that there was no fraud or concealment on the part of the insured."

We are not absolutely barred from holding in this case that there was an implied warranty of seaworthiness. The judgment of the House of Lords in *Gibson v. Small* (4 H. L. C. 858) was merely, that upon a time policy, where no special circumstances are shown rebutting the possibility that on the day when the risk was to commence the ship might be on the high seas in the middle of a voyage, there is no implied warranty that she should be seaworthy on that

day. But for the reasons which I gave in the House of Lords in the case of *Gibson v. Small*, and which I have given in this Court in the case of *Thompeon v. Hopper*,\* I think that there is no implied warranty of seaworthiness on any time policy.

I further think, that to imply the warranty of seaworthiness upon a time policy contended for in this case is hardly consistent with the principle on which the decision of the House of Lords in *Gibson v. Small* proceeded. The defendant here contends, and must contend, that on a time policy in this general form, if on the day on which the risk is to commence the ship be in a port in any region of the globe in which there are the means of repairing her and rendering her seaworthy, there is an implied warranty or condition that she shall be repaired and rendered seaworthy before she sails from the port, although the insured may not know that she stands in need of repair, and although he may have no funds nor means of raising funds there to repair her. With respect to whaling voyages in the South Seas, and other voyages in which time policies are most usual and most required, such a doctrine, I apprehend, would be exceedingly inconvenient, and would prevent shipowners from having that indemnity and security which time policies have hitherto afforded them. The House of Lords were influenced by the inconvenience which would arise from holding that there is an implied warranty of seaworthiness where the risk begins while the ship is on the high seas, and a similar inconvenience would arise from the implied warranty of seaworthiness, the risk beginning when the ship, in the middle of a long adventure, is in a distant port. Mr. Wilde, in his able argument, disclaimed what some have contended for, that under a time policy there is an implied warranty that the ship shall be seaworthy when she sails from any port where she may be repaired during the period of the risk, and he said "he asked only a warranty for the first voyage." But if the ship be in a distant foreign port when the risk begins, I can see no difference between the first voyage and any subsequent voyage; and, at all events, without showing that the insured is resident in the place where the port is, and that he has notice of the condition of the ship, it will be difficult to draw a distinction between the case where the ship at the commencement of the risk is in the port of London or in the port of Melbourne. The House of Lords having determined that there would be no implied warranty if the risk were to commence when the ship is a day's sail from the port of Melbourne, it seems strange that there should be an implied warranty of seaworthiness on the same policy if from a favourable wind the ship should have reached the port of Melbourne one day sooner.

I must again advert to the evils which would necessarily arise from nice distinctions as to the cases in which the warranty on a time policy is or is not to be implied. If the rule first laid down by

\* Ante, p. 457.

this Court in *Gibson v. Small* (16 Q. B. 141) had been confirmed, Courts of Justice would have had no difficulty in acting upon it; but when it has once been broken in upon, neither Mr. Wilde, nor any one else who proposes a modification of it, has laid down any qualified rule for our guidance; and I see no safe course except to adhere to the doctrine, that in all voyage policies, and in no time policies, there is an implied warranty of seaworthiness.

I will only further observe, on this part of the case, that I do not think that Mr. Wilde, with his learning and ingenuity, was able to bring forward any authority or argument bearing on the question which had not been considered in the House of Lords. In his quotations from Dow's reports (*Douglas v. Scott*, 4 Dow, 26, 269; *Wilkie v. Geddes*, 3 Dow, 57), Lord Eldon was evidently speaking of voyage policies, and the difference between them and time policies was never presented to the mind of that great Judge. When there is any warranty of seaworthiness, the insured need not make any disclosure as to the condition of the ship; but there is no difficulty in saying that where there is no such warranty, according to the *uberrima fides* which ought to prevail in the contract of insurance, concealment by the insured of anything exclusively in his knowledge which would affect the premium vitiates the insurance; and there can be no doubt that if the owners of a ship, engaged in a distant voyage, had received a letter from the captain stating that she had been seriously damaged by a storm, when effecting a time policy upon her, he would be bound to communicate this letter to the underwriters, so that they might have an opportunity of calculating and demanding an adequate premium.

As to the alleged absurdity of holding that there is no implied warranty of seaworthiness on this time policy, the ship insured for time sailing from Liverpool to Ceylon, while there would have been such a warranty had the ship been insured at and from London to Ceylon, I can only say that I see no absurdity, for the two contracts are different, and there may well be an incident belonging to the one which does not belong to the other.

Then with respect to what Mr. Wilde urged about a ship insured by a time policy having received her death wound the day before the policy was to attach, but keeping afloat till the meridian of that day, and then sinking in a calm sea, I answer that the new policy never would attach; for, according to the supposition, before the time when this policy was to attach she had ceased to be a navigable ship, and had become, in the language of Lord Tenterden, "a mere congeries of timbers."

Upon the whole, it seems to me that in this case the underwriters cannot set up any implied warranty of seaworthiness, and that they are liable for the final loss of the ship, which is allowed to have arisen by the perils of the sea insured against.

But a different question arises respecting their liability for the expense occasioned by reason of her putting into a port to be re-



paired, the loss to which the fourth plea is pleaded. The arbitrator has found that the facts alleged in that plea are true, although without the knowledge of the insured. What are these facts? "That when the ship sailed from Liverpool she was in an unseaworthy and unsound state and condition, and so continued till after his loss accrued; that she was not reasonably fit to encounter and bear the ordinary force of the winds and waves; that during this time she did not encounter any more severe weather than was usual and ordinary on such a voyage, or than a ship reasonably fit for the voyage could have encountered without damage or injury; and that the necessity for her going into port to be repaired arose from the defective state of the ship when she sailed." Although she was not seaworthy when she sailed, it must be taken, according to my view of the case, that the policy attached; but unless this loss arose from perils insured against, it cannot be cast upon the underwriters. Now, the arbitrator appears to find most explicitly, that it did not arise from any peril insured against, but from the vice of the subject of insurance.

The only answer attempted to this objection by Mr. Hill was, that for anything alleged by the fourth plea, this was not the first voyage of the ship, or the beginning of an adventure, so that the unseaworthiness might have arisen from some peril in an antecedent voyage, before she came to Liverpool, part of an adventure, of which the voyage stated in the declaration and plea was a continuation. But if the fourth plea could bear such a construction, I do not think that in deciding this special case we are to be governed by any such technicality. The arbitrator says, "I think fit to state this my award in the form of a special case for the opinion of the Court as to the right of the plaintiff to recover, with reference as well to the special matter I have found as to the question of the goodness of the pleas." Now, it is quite clear from the finding of the arbitrator, that the adventure did begin at Liverpool, that this was the first voyage, and that the unseaworthiness arose from the vice of the thing insured, and not from the perils of the sea in any antecedent part of the adventure.

I am therefore of opinion, that from the total sum awarded a deduction must be made for the expense occasioned by the ship going into port to be repaired, and for her repairs there; but that, subject to this deduction, there ought to be judgment for the plaintiff.

ERLE, J.—In this case, as to the fourth plea, I concur with the rest of the Court in thinking it good, and assent to the reasons assigned by my Lord for so thinking, if no warranty of seaworthiness is implied by law in respect of the policy in the declaration mentioned.

And as to the seventh plea, I think it good, on the ground that a warranty of seaworthiness is implied by law in respect to this policy, under the circumstances stated in the plea; and as I have

stated my reasons for that opinion in the case of *Thompson v. Hopper*,\* I beg to refer to that case instead of repeating them again.—*Judgment for plaintiff on the seventh plea; for defendant on the fourth plea.*

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### APPENDIX No. 5.

#### ARBITRATION CLAUSE IN A MUTUAL POLICY PERMITTED TO BE A CONDITION PRECEDENT TO AN ACTION.

SCOTT v. AVERY.

*House of Lords, July, 1856.*

IN this case, which was a writ of error brought to reverse a judgment of the Court of Exchequer Chamber, reversing a decision of the Court of Exchequer, the Lord Chancellor delivered judgment.

The case came before the Court of Exchequer on demurrer to four pleas in an action brought by the plaintiff on three policies of insurance effected on the ship *Alexander*, which were underwritten by the defendant. It appeared that both the plaintiff and the defendant were members of three mutual insurance associations—namely, the Newcastle General A 1 Assurance Association, the Tynemouth A 1 Assurance Association, and the Ocean Insurance Association. The declaration stated the fact of the policy of insurance having been made between the plaintiff and the defendant and other members of the association, and after setting out the policy alleged that it was mutually agreed that all the rules and regulations of the said association should be binding upon the assured and assurers, as if they were inserted in the policy and formed part thereof. The rules and regulations, so far as they were material to the plaintiff's claim, were as follows:—"That any member who shall prove to the committee of the association that his ship is lost will be entitled (at the expiration of two months from the date of the first quarterly settlement) to part payment of the same, but in no case to exceed 80l. per cent. on the sum insured until a final account of the proceeds of the sale of the materials is furnished to the underwriters. That the sum to be paid by this association to any suffering member for any loss or damage shall, in the first instance, be ascertained and settled by the committee, and the suffering member, if he agrees to accept such sum in free satisfaction of his claim, shall be entitled to demand and sue for the same as soon as the amount to be paid has been so ascertained and settled, but

\* Ante, p. 457.

not before, which can only be claimed according to the customary mode of payment in use by the society." It then alleged the performance by the plaintiff of his contract, the loss of the ship, and that the defendant and the committee were to ascertain the loss and pay it, but that they had not done so. There were similar counts against the two other associations. The defendant's plea was, that the plaintiff had not complied with the rules of the association, which compelled members to refer matters of amount in dispute to arbitration, and his refusal to do so had caused the non-settlement of his claim. The plaintiff demurred to the plea on the ground that it was bad in law, and that a compliance with the regulations of the association was not a condition precedent to his bringing an action, which accrued on the policy on the loss of the vessel, and that the rules in question were inconsistent with the policy, and therefore void. On the other hand, the defendant contended that the contract with the conditions included was an absolute contract, and ought to prevail, unless contrary to law, which it was urged it was not. The Court of Exchequer gave judgment on the demurrer for the plaintiff, holding that the plea was bad, and that judgment having been reversed by the Exchequer Chamber, the present writ of error was brought before their Lordships, who heard the arguments, the learned Judges being in attendance. At the conclusion of the arguments, the Lord Chancellor put the following question to the learned Judges for their consideration—namely, whether, looking at the record in this case, judgment should be entered for the plaintiff in error or the defendant in error. The learned Judges, after having taken time to consider the question, differed in their opinions, the majority, however, being in favour of the affirmation of the judgment of the Court of Exchequer Chamber.

THE LORD CHANCELLOR, now, in giving judgment, said the writ of error in this case had been brought upon a decision of the Court of Exchequer Chamber in an action brought upon a policy of insurance which had been underwritten by the defendant. The only material plea was the fifth, setting forth one of the rules of the association, which was, that, if any difference should arise among the members, the member dissatisfied should select an arbitrator, and if the committee were not satisfied with the person appointed they should select another arbitrator, and these two should select a third, who was to determine the matters in dispute and the sum to be awarded, and that no action should be brought until such arbitration had taken place. The Court of Exchequer decided that the plea was bad, and was no answer to the action. That decision was reversed by the Court of Exchequer Chamber, and the latter judgment was now brought before their Lordships' House. It appeared to him merely a matter of the construction to be put upon the policy itself, for there was no doubt that persons could not by contract oust the Court of its ordinary jurisdiction. That point had been decided in many cases, but there was no principle of law which prevented parties from

entering into any contract that no right of action should accrue until after a reference had been made to an arbitrator. If he (the Lord Chancery) covenanted with A. not to do a particular act, and it was agreed between them that any question which might arise should be decided by an arbitrator without bringing an action, then a plea to that effect would be no bar to an action; but if they agreed that J. S. was to award the amount of damages to be recoverable at law, then if such arbitration did not take place no action could be brought. Now, in the present case did any right of action accrue until the amount of damage had been ascertained by arbitration? He thought clearly not; the condition precedent to the right of a member bringing an action for the recovery of his insurance was that the amount of the sum was to be ascertained by arbitration, and by no other means. It had been urged that there were other matters than the amount of damages for the arbitrator to decide; but he did not think that altered the case at all, although the learned Judges had differed in their opinion. He was therefore of opinion that the judgment of the Court of Exchequer Chamber, in reversing the judgment of the Court of Exchequer, was correct, and he had therefore to move their Lordships that the judgment of the Court below be affirmed.

LORD CAMPBELL said he had heard the case very fully and ably argued at the bar of the House, and he had carefully read over the opinions of the learned Judges. He had taken no part in the decisions in the Courts below, and he came to the same opinion with his noble and learned friend on the woolsack, it appearing to him that upon principle and without overturning any authorities their Lordships ought to affirm the judgment of the Court below. Now, it appeared to him in the first place that the contract between the shipowner and the underwriter in the present case was quite clear—as clear as the English language could make it—that no action should be brought against the insurer until an arbitrator had disposed of any dispute which might arise between them. That was declared to be a condition precedent to the bringing of any action, and was no doubt the intention of the parties at the time. He (Lord Campbell) was of opinion that this embraced not only an assessment of damages, but any dispute which might arise between them. That being the intention of the parties, was the contract illegal? It was declared to be contrary to public policy. That was rather a dangerous ground to go upon. What pretence was there for saying that because this association wished to avoid being distressed by continual actions, and preferred referring disputes to a domestic and private tribunal among themselves, that they had no right to do so? That would be most inexpedient, and would be a violation of the liberty of the subject. He could see no ill consequences, and he saw great advantages, from the practice. Public policy, therefore, seemed to require that the contract should be declared valid. He knew that great obstacles had been thrown

by the Courts in the way of proceeding by arbitration, but with all respect to his learned predecessors, he would let their Lordships into the secret of their doing. There was no disguising the fact, which was that formerly the chief part of the Judges' salaries depended upon fees, and there was a great desire therefore to have as much business as possible brought into Westminster Hall. One description of procedure took causes into the Court of Queen's Bench, another into the Common Pleas, and a third into the Exchequer, but arbitration took them out altogether, and therefore robbed the Judges. In the present case, the arbitration not having taken place, the Courts were not ousted of their jurisdiction, for the cause of action did not accrue. While this case had been going on he was happy to say that the question had been substantially decided in the Court of Exchequer during last Hilary Term, in the case of *Brown v. Overbury*, reported in the 11th Exchequer Reports, page 715. That was an action on a horse-race. The plaintiff, who had contributed to the sweepstakes, said that his horse had won the race, and he brought his action against the stakeholder to recover the amount of the stakes; but it was a condition in the race that the stewards should decide who was entitled to the stakes. It turned out that the stewards had not decided, for they differed in their opinion. Then he attempted to show that his horse had won the race, but the learned Judge presiding at the trial held that he could not prove that, because, even if the horse had won, the action could not be brought until the question had been decided by the stewards. It was then taken before the Court of Exchequer, which decided that the ruling of the learned Judge was correct, and the nonsuit was confirmed. The present case was upon the same principle, and he considered the decision he had just mentioned as a strong authority in point, and calculated to remove any scruples which their Lordships might have in confirming the judgment of the Court of Exchequer Chamber, which reversed the judgment of the Court of Exchequer.

THE LORD CHANCELLOR then stated that Lord Brougham, who was absent from illness, had requested him to state that he entirely concurred in the opinion which had been just expressed by his noble and learned friend and himself.

The judgment of the Court of Exchequer Chamber was then affirmed with costs.

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## APPENDIX, No. 6.

## SENDING BACK AN AWARD.

J. G. MORRIS v. R. MORRIS.

*Queen's Bench, May, 1856.*

WIGHTMAN, J.\*—I am of opinion that this rule ought to be discharged.

With respect to the first point, I think the terms "as aforesaid" in sect. 8 include all references provided for in the previous sections, and therefore that section applies to a reference by consent provided for in sect. 5, notwithstanding the intermediate sect. 6 begins a new head of arbitration, and sect. 7 has the words "as aforesaid." Therefore the Judge had power to send back the award to the arbitrator.

Secondly, it is said that the arbitrator misconducted himself in not giving notice of a meeting and hearing the parties. But the object of sending back the award was not that the parties should attend before him, but that he should put that right which on the face of it was wrong; and he has not done more. In the original award he ordered that the parties should pay the costs which he himself ascertained in equal moieties. In the supplemental award he leaves the costs to be taxed by the officer of the Court, which is what he ought to have done before. The supplemental award is the same in substance as the original, though more formal.

As to the other point, the submission provided expressly, that "in case of any motion to set aside the award," the Court might remit the matters referred; but that provision does not restrain the general power to send back the award under sect. 8 of the statute, and it may be considered mere surplusage.

ERLE, J., concurred.

CROMPTON, J.—The first question is of general importance; and on moving for the rule *nisi* to show cause, I was afraid that there was an important omission in the statute; but on looking into the sections, it is quite clear. I am satisfied that sect. 8 is not confined to references under sect. 6, but applies to all others previously treated of: therefore it applies to a submission by agreement of the parties.—*Rule discharged.*

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\* Lord Campbell, C. J., was absent.

## APPENDIX, No. 7.

INSURANCE ON MONEY ADVANCED ON FREIGHT,  
AND ITS LIABILITY TO CONTRIBUTE TO GENERAL  
AVERAGE.

HALL v. JANSON.

*Queen's Bench, January, 1855.*

LORD CAMPBELL, C. J., in delivering the judgment of the Court, said:—The first question to be determined in this case is, whether the declaration be good upon the face of it.

The defendant contends that it does not show any loss by perils assured against, within the meaning of the policy; but we think that it contains sufficient allegations of the accruing of a General Average loss for which the underwriters are liable. The pleader in his history of the voyage begins by narrating disasters, the loss occasioned by which must be borne exclusively by the owner of the ship; "that by means of stormy and tempestuous weather she was greatly damaged, and compelled to put into Valparaiso to be repaired, where she was repaired." But there is a further statement, "that for the purpose of repairing her, it was necessary to unload and reload the cargo; that divers of the costs and expenses so incurred were the subject of a General Average loss; and that the party assured by this policy, in respect of the interest assured, became liable to contribute thereto." Now, the expenses necessarily incurred in unloading and reloading the cargo for the purpose of repairing the ship, that she may be made capable of proceeding on the voyage, have been held to give a claim to General Average contribution; for the acts which occasion these expenses become necessary from perils assured against, and they are deliberately done for the joint benefit of those who are interested in the ship, the cargo, and the freight. (*The Copenhagen*, 1 Rob. 289; *Plummer v. Wildman*, 3 Mau. & S. 483; *Stev. Aver.* 21.) This doctrine is quite consistent with what is laid down in *Power v. Whitmore* (4 Mau. & S. 141), and the other cases relied upon by Mr. Wilde.

We are next to consider the sufficiency of the plea. For this purpose we must examine the written contract, and see what it says respecting such a loss. The policy not only contains general words to indemnify the assured, but it expressly declares that "freight is warranted free from Average under 5*l.* per cent., unless general, or the ship should be stranded." Therefore the underwriter on freight expressly, absolutely, and universally, undertakes to pay General Average, however large or however minute the amount may be. The interest assured by this policy, "being money advanced to the assured as owner of the ship, on account of freight of the cargo

loaded on board her, and subject to the risk of the voyage," is really and substantially freight, being the recompence to be earned by the owner of the ship if he carries the goods on the voyage assured, and delivers them at the port of destination. As he must repay the amount if he fails to do so, although prevented by the perils of navigation, the circumstance of its being conditionally paid in advance does not alter its character.

Mr. Wilde contends that this interest could not be assured as freight, and that from the description of it in the policy, "money advanced on account of freight," the underwriters were authorised in supposing that the assurance was effected by the charterer of a ship, or the shipper of goods, on money paid on account of freight to the owner of the ship. Money paid in advance by a charterer or shipper of goods is not, in strictness, freight: it has been called more properly "the price of the privilege of putting the goods on board the ship, to be conveyed to their place of destination." But great latitude is allowed in describing the interest in a policy of assurance, provided that the nature of it is intelligibly disclosed; and there seems no reason why the money advanced may not be assured as freight, as well as the money to grow due on the charter, which is undoubtedly assurable as freight, although not properly freight, and rather the price of the hire of the ship. Nor do we see how we can be called upon to infer that the expression "money advanced on account of freight" necessarily indicates that the assurance is effected by the charterer or shipper, and that the freight paid in advance is at his risk, not at the risk of the shipowner. If this be a fact, and a fact material for the defendant, he ought to raise the question by some traverse or plea.

Assuming now that there is by this policy an express contract that the underwriters shall be liable for General Average, can the alleged usage be set up as a bar to the action? We think that it cannot, for it is entirely in derogation and contradiction of the written contract. Usage may be relied upon to show the sense in which an expression found in a written contract is used in a particular trade; and a usage consistent with a written contract may be introduced into it, as both parties, being aware of it, may be supposed to intend that it shall form part of their bargain. But to let in verbal evidence of a usage, for the purpose of contracting and nullifying an express written contract, would be contrary to all principle, and has been forbidden as often as the attempt has been made. It may be enough to refer to the case of *Blackett v. The Royal Exchange Assurance Company* (2 Cr. & J. 244), in which it was held, that to an action on a policy in the usual form, "on ship, boats," &c., the defendant could not set up a usage that under such a policy the underwriters cannot be called upon to pay for the loss of boats slung on the outside of the ship upon the quarter. Says that great Judge, Lord Lyndhurst (p. 249)—"It was not to explain any ambiguous words in the policy, any words which might admit



of doubt, nor to introduce matter upon which the policy was silent, but was at direct variance with the words of the policy, and in plain opposition to the language it used. . . . Usage may be admissible to explain what is doubtful; it is never admissible to contradict what is plain."

Reference was made in the argument to the recent case of *Brown v. Byrne* (3 El. & Bl. 703); but this Court by no means intended there to depart from the principles which we have now laid down; and the marginal note in the report (3 El. and Bl. 703) would better express the view taken of the subject by the Judges who concurred in that decision if it had said that the custom "was not inconsistent with the bill of lading," instead of saying that "it controlled the bill of lading."

In the present case, without further entering into the authorities, we think it enough to say, that in our opinion the declaration is sufficient; the plea is bad, and there must be—*Judgment for the plaintiffs.*

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## APPENDIX, No. 8.

### GENERAL AVERAGE.

MORAN v. JONES.

*Queen's Bench, April, 1857.*

THIS was a special case for the opinion of the Court, and which raised the question whether the freight and goods on board the *Tribune* were, under the circumstances, subject to General Average. The plaintiff was the owner of the ship *Tribune*, and had chartered her for a voyage from Liverpool to the Chincha Islands and back, going out in ballast and bringing home a cargo of guano. The shipowners had leave from the charterer to carry out to Callao a small quantity of goods. The freight to be paid for the guano under the charter being valued at 6,750*l.*, was insured against the perils of the voyage out to the extent of 3,500*l.* The ship, with some goods on board, set sail from Liverpool, and, having met with severe weather on the outside, several sacrifices were made, which it was agreed on both sides were General Average charges. The ship afterwards got upon the Hoyle Bank, and the goods on board and part of the tackle were taken to Liverpool in lighters, where they were kept under the charge of the ship. After the discharge of the goods there was 643*l.* expended for taking the ship off the bank and bringing her to Liverpool. After the repair of the ship the goods were reshipped, and she sailed with them on her voyage. The

question was whether the goods, having been landed, were thus freed from contributing to the 643*l.* incurred afterwards; and again, if the goods were freed, whether the freight should not also be freed, there being no cargo on board at the time.—Mr. James Brown argued the case for the plaintiff, and Mr. Colin Blackburn for the defendant.—The Court, having taken time to consider,

LORD CAMPBELL now delivered the judgment of the Court as follows:—In this case we never doubted that the defendant, as underwriter on the freight, was liable for a contribution to General Average in respect of the sum of 643*l.* 11*s.* 1*d.*, the expenses incurred in order to get the ship off from the bank on which she was stranded, whether the goods were or were not liable to contribute to this portion of the loss. It is admitted "that the ship could not have been got off and completed her voyage unless these expenses had been incurred." Therefore, without these expenses there would have been a total loss of the freight, amounting to the sum of 6,750*l.* Even if the goods were not liable to contribute, on the ground that they were not exposed to any peril when these expenses were incurred, still the freight which was then exposed to peril, and has been saved, ought to contribute as if there never had been any goods on board, and the ship had sailed from Liverpool to Callao in ballast. Usually, where there is a General Average, ship, freight, and goods, all contribute to it; but if there be no goods on board, and by a voluntary sacrifice ship and freight are saved at a common peril, the goods (freight?) ought rateably to contribute to the loss; and, where there are separate insurances on ship and freight, the calculation must be made as to the amount of the contribution by each, although the whole of the freight which was in peril is to be received by the owner of the ship, and, without insurance, the whole of the loss would fall upon him. But the sum for which the defendant is liable will depend to a certain degree upon the question whether, under the circumstances stated, the goods are to contribute in respect of the 643*l.* 11*s.* 1*d.*, and upon this question, likewise, we are bound to give our opinion. The goods had been taken from the ship and put on board a lighter before these expenses were incurred; and if this had been a separate operation, by which they were intended to be saved for the benefit of the owner of the goods, we should have thought (as in *Job v. Langton*) that the goods were not liable to contribute to the expenses subsequently incurred. Looking, however, to the facts stated in this special case, it seems to us that the act of putting the goods on the lighter was only part of one continuous operation, viz., getting the ship off the bank on which she was stranded, and sending her to Liverpool, where she might be repaired, with a view to prosecute the original adventure. When she got to Liverpool, the operation of saving her from shipwreck was completed, and the whole expense of the repairs fell upon the owner, and must be borne by him in that capacity, or by the underwriters on the ship; but the expenses of this continuous

operation for the common benefit of the ship, goods, and freight, are the subject of a General Average. In *Job v. Langton* we considered that the goods had been saved by a distinct and completed operation, and that afterwards a new operation began, which could not be properly distinguished from the repairs done to the ship to enable her to pursue the voyage. "The steam-tug did not work at the ship, and does not appear to have been engaged till after the cargo was landed, and the coals and ballast had been taken out of her." In giving judgment, the Court there observed :—"The employment of the steam-tug and the cutting of the channel by which the ship was rescued, cannot, as was contended for, be part of the same operation as the unloading of the cargo. Under the circumstances stated, after the cargo had been safely discharged and loaded, it does not even appear it was for the advantage of the owner of the cargo that the ship should have been got off the strand and repaired. The owner of the ship, after the cargo was discharged, appears to have done nothing except in the discharge of his ordinary duty as owner, and for the exclusive benefit of the ship." But in the case on which we have now to adjudicate, the goods were put into a lighter by the master of the ship along with the materials of the ship saved from the wreck, and they remained in the custody and under the control of the master till the ship was repaired, when they were reloaded in the ship and carried forward, without any interference by the owner of the goods, to their destined port. Unless it had been intended that an operation should be undertaken and completed by which both ship and goods should be rescued from the peril to which they were exposed, nothing might have been done, and the goods might have perished. Because the goods happened to be saved in the earliest part of the operation, this can be no sufficient reason for saying that they ought not to contribute to all the expenses of the operation which contemplated the benefit of all the interests imperilled by the stranding. We are glad to find that this distinction (which we had in view in *Job v. Langton*) is recognised and sanctioned by decisions in the United States of America, which, upon such subjects, we always regard with the highest respect. The result is that, in our opinion, the first apportionment proposed by the average settler is right, on the principle of charging the 64*l.* 11*s.* 1*d.* to General Average, so as to make the whole sum to be contributed by ship, cargo, and freight, amount to 2,197*l.* 17*s.* 8*d.* Judgment accordingly.—*Shipping Gazette*.

The case referred to in the above judgment, viz., *Job v. Langton*, tried in June, 1856, was that of the *Snowdon*. LORD CAMPBELL, in delivering judgment, said :—"We are of opinion that the expenses incurred in getting off the ship, and taking her to Liverpool for repair, after the entire cargo was discharged and in safety, are not chargeable in General Average, but are chargeable as Particular Average on the ship alone. There is no decision upon this distinct

point, and there is no mercantile usage stated, to guide us; we must, therefore, resort to the general principles on which this Average law rests. We begin with the definition of General Average by Mr. Justice Lawrence in *Birkley v. Presgrave* (1 East, 228)—a loss arising out of extraordinary sacrifices made, or expenses incurred, for the preservation of the ship and cargo—meaning for the joint benefit of the ship and cargo, and which must therefore be borne proportionably by all who are interested. Here it cannot be said that there was any sacrifice, as in cases of jettison of part of the cargo, or a voluntary cutting away of masts and sails of the ship. The stranding was fortuitous, arising directly from the perils of the sea. The expenses, to constitute General Average, must, therefore, be brought within the second category—extraordinary expenses incurred for the joint benefit of the ship and cargo. They were extraordinary expenses, not to be ascribed to wear and tear; and therefore to be borne by the underwriter; but are they to be considered as incurred for the joint benefit of the ship and cargo, so that a portion of them ought to be borne by the owner of the cargo, or the underwriter of the cargo? Although the stranding was fortuitous, all expenses incurred from the misadventure, till the whole of the cargo had been discharged, confessedly constituted General Average. But how can it be said that subsequent expenses, of getting off the ship and taking her to Liverpool for repair, were of the same character? The employment of a steam-tug and the cutting out of a channel, by which the ship was rescued, cannot, as was contended for, be part of the same operation as the unloading of the cargo; for the case expressly finds that the steam-tug did not work at the ship until after the cargo had been landed and the coals and ballast taken out of her. We therefore do not see how these expenses are to be distinguished from the expenses of repairing the ship when she had been brought to Liverpool, which it is admitted must fall exclusively on the owner of the ship or the insurers of the ship, as Particular Average. If the owner of the ship was to earn a stipulated freight by carrying a cargo to Newfoundland, it was his duty to repair her, and to carry her to a place where she might be repaired. Mr. Blackburn's position is, that the end in view of every maritime adventure being the arrival of the ship with her cargo at her destination, extraordinary acts done to effectuate that, giving rise to General Average, would justify him in contending that these expenses do not constitute Particular Average. But, unfortunately for him, the expenses incurred in repairing the ship at Liverpool, according to this reasoning, would equally be General Average; for the repairing of the ship was an extraordinary act, which was necessary for the arrival of the ship with her cargo at Newfoundland, and this was as much for the joint benefit of the ship and cargo as the bringing her to Liverpool from Malahide, under the circumstances stated, after the cargo had been safely discharged and warehoused. It does not appear that it was for the advantage of the owner of the

cargo that the "Snowdon" should be got off the strand to repair; and, of course, we do not, contrary to the intention of the parties, attach any importance to the fact that the cargo was forwarded by another vessel; and we should give our decision as if the "Snowdon," after she had been repaired, had carried the cargo to its ultimate destination. But, in the absence of any statement to the contrary, we must infer, as the fact undoubtedly is, that there would be no difficulty in forwarding the cargo by another vessel. We do not say there may not be a case where, after the fortuitous stranding of the ship, and the cargo being unloaded, the expenses voluntarily incurred by the owner of the ship to get her off and enable her to complete the voyage, whereby the cargo, which must otherwise have perished, is carried to its destination, may be General Average; as the stranding of a ship, with a perishable cargo, on a desert island in a distant region of the globe. But in the present case, the owner of the ship, after the cargo was discharged, appears to have done nothing except discharging his ordinary duty as owner, and for the exclusive benefit of the ship. Notwithstanding some expressions of Lord Ellenborough in *Plummer v. Wildman*, we consider it quite settled that, by the law of this country, the expenses of repairing the ship, after the cargo is safe, to bring her to a place to be repaired, cannot under such circumstances be made the subject of General Average. We have examined all the authorities which were cited in the argument, but, not considering that there would be any further argument upon it, we give judgment against the defendant, as underwriter of the ship, in respect of the sum of money due for the expenses in question of Particular Average.

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#### APPENDIX, No. 9.

#### EFFECT UPON FREIGHT OF THE ABANDONMENT OF A SHIP.

MILLER v. WOODFALL.

*Queen's Bench, November, 1857.*

LORD CAMPBELL, C. J., in delivering the judgment of the Court, said:—In this case, the first question which we are called upon to answer is, "Whether anything in the nature of freight, for the entire voyage from St. John's to Liverpool, passed to the underwriters on the ship, on the abandonment of the ship?" If the goods, on board the ship at the time when the casualty to which the abandonment refers occurred, had belonged to third persons, for whom they were to be carried on freight from St. John's to Liverpool,

there can be no doubt that, by our law, the right to the whole of that freight would have passed to the abandonees of the ship. The abandonees are considered as purchasers of the ship at the moment of the casualty to which the abandonment refers; and although the contract of a shipowner does not run with the ship, it is well settled that, as incident to the ship, the right to the whole freight, pending at the time of the sale and subsequently earned, belongs to the purchaser of the ship. The American Courts,—presuming that ship and freight are always separately insured, and taking into consideration the respective rights and equities of the different sets of underwriters, when the loss is finally adjusted among all parties, assured and assurers,—make an apportionment of the freight earned partly before and partly after the casualty for which the abandonment of the ship is made; so that the freight earned previous to the casualty may go for the benefit of the underwriters on freight, to whom there has been an abandonment, and only the freight earned after the casualty vest in the abandonee of the ship. (See the authorities collected, 2 Arnould, s. 404.) But (as in the present case), in adjusting the rights of assured and assurer, on ship, we do not look beyond these parties; and the abandonee of ship, like the purchaser, has a right to the whole of the freight pending at the time of the casualty, although he could not claim freight paid or completely earned in a prior part of the voyage. (*Stewart v. the Greenock Marine Insurance Company*, and the *Scottish Marine Insurance Company v. Turner*.) But in the case which we have now to decide, at the time of the casualty there was no freight pending. The goods in the ship were the property of the owner of the ship; he was carrying them on his own account, and he could have no contract with himself. As between him and the underwriter on ship it was quite immaterial that, under the designation of "freight," he had insured with other underwriters the increased value of his goods by reason of their being carried from St. John's to Liverpool. Considering as a test what would have passed to the purchaser on a sale of ship at the time of the casualty, it seems clear that he could have had no claim against the vendor in respect of the goods having been carried in the ship from St. John's to Southport before the sale. No more can the abandonee. At the moment of the casualty the goods had become more valuable to the owner from being carried the greatest part of the voyage, and he might have sold them afloat at an increased price. This is rather analogous to the case of freight earned and recovered by the owner of the ship before the abandonment; to which the abandonee of the ship would have no claim. We are, therefore, of opinion that it is only for any benefit which the owner of the goods may have derived from the use of the ship subsequent to the casualty, that the abandonees can claim compensation in the nature of freight. But for so much of the cargo as was brought in the ship from Southport to Liverpool, we think such compensation is due

from the plaintiff, as owner of the goods, to the abandonees. For the part of the cargo brought by the plaintiff in lighters from Southport to Liverpool, we think no such compensation can be claimed; as this operation was conducted by the plaintiff himself for his own benefit, and this part of the cargo must be considered as finally severed from the ship at Southport. The principle on which the compensation due ought to be calculated, we think, is by considering for what sum the part of the cargo brought in the ship to Liverpool might have been conveniently forwarded from Southport to Liverpool in another ship, according to the current rate of freight, to be adjusted by an average settler, according to the agreement of the parties.—*Law Journal*.

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#### APPENDIX, No. 10.

##### OVER-INSURANCE; DEFICIENCY OF INTEREST; AND WAGERING POLICIES.

At page 184 *et infra*, a formula is given of the manner in which the value of goods is made up for insurance. The value in a policy must always commence with a real and valid interest of monetary value; but to the first cost may be added all incidental expenses, a reasonable profit, and the cost of insurance, and commission for recovering on the policy in case of loss. Some persons, however, entertain strong prejudices about interest; and many feel timid lest by insuring much above the cost of the goods they should legally invalidate their insurance. The prejudice and the fear are almost groundless in our days, but they arose out of a state of things which a century ago had grown to an outrageous height, and was endangering the system of insurance by reducing it to the level of a great game of chance. The law interposed; and by strictly defining the nature of insurable interests, and by voiding *no-interest* or *wagering* policies, brought back underwriting to its legitimate office. But as in all cases where castigation has been used, a greater or less fear of the rod follows as a consequence, so persons grew timid or fastidious on the subject of interest. The wrong impressions have been partly done away by some late decisions on life policies. And lest an assured should feel doubts as to his position, I extract some instances collected by the writer of an article on assurance in the *Edinburgh Review* (Jan., 1859), which will serve to show what sort of abuses had come to pass under the cloak of insurance, and how necessary it was for Legislature to interfere in preventing wild speculations in contingencies, which bargains were then named "Insurance Wagers."

"Some of these establishments," says the reviewer, "wagered

30*l.* against 100*l.* that King William the Third (who was then carrying on war with France) would not reduce the City of Namur before a given date; others wagered on the period of favour to be enjoyed by the mistresses of some foreign potentate; and wagers were actually laid on the sex of the notorious Chevalier D'Eon, as to whether he was a *male*, as he pretended to be, or a *female*, as he was reputed to be. A common stake at hazard was the duration of the lives of persons believed to be on their deathbeds.

\* \* \* \* \* The *London Chronicle*, of 1768, published the following observations:—

“The introduction and amazing progress of illicit gaming at Lloyd's coffee-house is, among others, a powerful and very melancholy proof of the degeneracy of the times. Though gaming in any degree is perverting the original and useful design of that coffee-house, it may be in some measure excusable to speculate on the following subjects:—Mr. Wilkes being elected Member for London; which was done from 5 to 50 guineas per cent. Mr. Wilkes being elected Member for Middlesex, from 20 to 70 guineas per cent. Alderman Bond's life for one year, now doing at 7 per cent. On Sir J. H. being turned out in one year, now doing at 12 guineas per cent. On John Wilkes' life for one year, now doing at 5 per cent.—N. B. Warranted to remain in prison during that period! On a declaration of war with France or Spain in one year, 8 guineas per cent. But when policies come to be opened on two of the first peers in Britain losing their heads, at 10*s.* 6*d.* per cent., or on the dissolution of the present Parliament within one year, at 5 guineas per cent., which are now actually doing and underwritten, chiefly by Scotsmen, at the above coffee-house, it is surely high time to interfere.' Royalty itself was included. The *Public Advertiser*, of Dec., 1771, contradicting an account of the illness of the Princess Dowager of Wales, concludes 'such reports being only calculated to promote the shameful spirit of gambling by insurances on lives.' \* \* \* \* Insurance schemes have been propounded for insuring against housebreakers and highwaymen; against lying, or death by drinking gin; for dealing in hops, for a flying-machine, for insuring of horses, &c. Large sums were paid by the underwriters at Lloyd's, who speculated upon the failure of a young man who had undertaken for a wager to go to Lapland, and bring back within a given time two rein-deer and two Lapland females—and he brought them all. But the climax of impudence was reached during the era of the South Sea Bubble, by a scheme in 'Change Alley for the insurance of female chastity, and by another against divorces.”

The writer of this article might have added to his list the following three contingencies, which may be done at this minute, against hail, against breakage, and against twins. The last can be done at one per cent., so as to leave a profit.

The Act for the Suppression of Gambling Insurances was passed in 1774. Wager policies were by it rendered illegal. But though



a policy "with or without interest" could not be brought into Court, speculative men still calculated the value of contingencies of various kinds. A person now living informed me that he insured the peace with America for a large amount.

What has been adduced will serve to indicate the class of insurance which the Act of the 14th George III. was intended to prevent, and to prevent too great timidity as to insurable interests.

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### APPENDIX, No. 11.

#### LIMITATION OF CLAIM OF AN ABANDONEE OF SHIP TO FREIGHT.

HICKIE v. RODOCANACHI.

*Exchequer, May, 1859.*

WHILST these pages were passing through the press, judgment has been given in the case of *Hickie v. Rodocanachi*. It is useful in defining the limits in one direction of the rights of an underwriter on ship in respect to freight after abandonment. The "*Sarah Sands*" was chartered by Government to transport troops to Calcutta: she took fire at sea, and was eventually taken into Mauritius, where the vessel was abandoned to her insurers, and they accepted the abandonment. The ship "*Clarendon*" was hired by the captain of the "*Sarah Sands*" to carry on the troops to their destination, thus fulfilling the contract made with Government for the transport of the men and officers. The abandonees of ship demanded to have the balance of freight paid to them which became due on the arrival of the "*Clarendon*" at Calcutta. Baron Bramwell, in delivering the judgment of the Court, said that the rights of the abandonees stopped with freight earned by the vessel abandoned, and could not extend to freight earned in another ship, although substituted to fulfil a contract originally made with the ship abandoned; the arrangement with the "*Clarendon*" being a second and independent contract.

This decision seems strictly in accordance with the dictum on which a ship-abandonee grounds his claim to freight,—viz., that freight is an incident of the ship insured; and unless varied on appeal must be conclusive of the subject.

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